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The Shin Beth Affair: National Security Versus The Rule of Law in the State of Israel

PAUL F. OCCHIOGROSSO*

"Did you take them captive with your sword
and bow that you would strike them down?"

II Kings 6:22

I. INTRODUCTION¹

On the evening of April 12, 1984, four eighteen-year-old Palestinians from the Israeli-occupied Gaza Strip boarded a commuter bus headed south from Tel Aviv toward the coastal city of Ashkelon. About thirty-five Israelis were aboard. Shortly after boarding, the Arabs pulled knives and grenades and ordered the driver to continue past his destination and toward the Gaza Strip, saying they intended to take the bus from Gaza across the border into Egypt and from there negotiate the release of 500 Palestinians held in Israeli prisons.

The plan did not succeed. The passengers convinced the hijackers to let a pregnant woman off the bus; she then flagged down a truck and reported the hijacking. The Army and police set up roadblocks along the highway as the terrorists forced the driver to continue south toward, and then into, the Gaza Strip. Soldiers fired at the tires, even-

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Under the auspices of the Columbia Human Rights Internship program, the author worked during the summer of 1986 for Amnon Zichroni, an Israeli civil rights attorney and one of the petitioners in the case that is the main subject of this article.

All translations of Hebrew materials are those of the author, unless otherwise indicated.

1. The first part of the following account, through the text accompanying note 8, is based on D. SHIPLER, ARAB AND JEW 86-90 (1986). Mr. Shipler was the New York Times Bureau Chief in Jerusalem from 1979 to 1984 and covered the events described herein for that newspaper. For a comprehensive account, in Hebrew, of the various military, political, and legal events leading up to the Israeli Supreme Court decision that is the main subject of this article, see Maariv (Israeli daily newspaper), Special Supplement on the "Shin Beth Affair," July 18, 1986 [hereinafter Special Supplement]. The Maariv supplement was also relied upon in part for the factual background.

tually blowing them out, and the bus came to a stop at the side of the road, just north of the refugee center of Dir al-Balah.

Throughout the night, Army commandos prepared to assault the bus, while officers pretended to negotiate with the terrorists. At dawn the troops attacked, rescuing all of the hostages except one, a woman who was struck by the soldiers' gunfire and killed. Initial news reports, heavily censored, carried the Army's statement that all four hijackers were killed—two immediately and two who were mortally wounded in the assault and who then died on their way to the hospital.

Such was not the case. In fact, two of the terrorists had been captured alive and led away for interrogation. Exactly which security force had custody of them is not clear. There were reports that both the Border Police and the Shin Beth,² Israel's secret police responsible for internal security and the fight against terrorism, were involved. The Israeli security forces beat the two Palestinians to death; both died with fractured skulls.

When this information eventually became public,³ a commission of inquiry was established to investigate the allegations.⁴ The cause of death was determined, and the case was referred to the Attorney Gen-

2. Shin Beth, as the secret police are often referred to in English, are two Hebrew letters that stand for the organization's full title, Sherut HaBitahon HaKlali, which means the General Security Service. (Although usually spelled "Beth" in English, the second part of the name is pronounced "bet.") The organization will be referred to in this article as the Shin Beth. It is responsible for domestic security concerns, specifically terrorism, and is roughly equivalent to the American F.B.I. It is to be distinguished from the organization known as the Mossad, which is roughly equivalent to the American C.I.A., and which is responsible for Israeli security concerns abroad.

3. The details of the two terrorists' deaths were not immediately made public. In fact, the Army's original version, that the two terrorists who were not killed in the initial assault died on their way to the hospital, might not have ever been refuted had it not been for pictures taken by newspaper photographers on the scene. The photographs showed the two captured terrorists being led away alive. These photographs were not made public for several days. Reporters from the newspaper *Hadashot* took the photographs to the Palestinians' home village in the Gaza Strip, where relatives and neighbors identified the two men. The information and photographs were provided to David Shipler, who wrote several stories for the New York Times. See, e.g., *Hijacker's Death: Question in Israel*, N.Y. Times, Apr. 19, 1984, at A4, col. 3; *Death of a Hijacker: Stirrings in Israel*, N.Y. Times, Apr. 23, 1984, at A3, col. 1. See also D. SHIPLER, *supra* note 1, at 88-89.

4. The Commissions of Inquiry Law, 23 Laws of the State of Israel 32 (1968) [hereinafter L.S.I.] (authorized translation from the Hebrew, prepared by the Ministry of Justice), provides, *inter alia*: "When it appears to the Government that a matter exists which is at the time of vital public importance and requires clarification, it may decide to set up a commission of inquiry which shall inquire into the matter and shall make a report to it." *Id.* § 1. See generally Elman, *The Commissions of Inquiry Law, 1968*, 6 ISRAEL L. REV. 398 (1971).

eral's office for possible prosecution. More than a year later, in the summer of 1985, Attorney General Yitzhak Zamir called for the prosecution of twelve officials,⁵ various security personnel who were on the scene at the time of the killings. But prosecution was slow in coming, and sixteen months after the murders, General Yitzhak Mordechai, who had admitted to pistol-whipping the hijackers—to discover quickly, he claimed, whether they had left explosives on the bus—was acquitted.⁶ Charges against the other eleven security men were dropped. As David Shipler, the *New York Times* correspondent who covered the story, writes, "The two hijackers were dead, but nobody was guilty of killing them."⁷

In the spring of 1986 the issue was revived. The deputy chief of the Shin Beth and two other officials went to Prime Minister Shimon Peres and accused Avraham Shalom, the head of the Shin Beth, of ordering the murders of the two Palestinian prisoners and then coordinating agents' testimony so as to place the blame on General Mordechai. It appeared that General Mordechai and his troops had beaten the hijackers, but had turned them over to Shalom and his Shin Beth agents, who then clubbed the Palestinians to death. Prime Minister Peres did not act on this information. Attorney General Zamir called for a police investigation, but this was opposed by Peres as well as Vice-Prime Minister and Foreign Minister Yitzhak Shamir, who had been Prime Minister at the time of the hijacking and thus in direct charge of the Shin Beth. The spreading scandal threatened to topple the National Unity Government coalition of which Peres's Labor Party and Shamir's Likud Party were the main partners.

Attorney General Zamir resigned in protest, and the newly-appointed Attorney General, Yosef Harish, widely seen as a puppet of the government,⁸ took up consideration of the issue. Harish deter-

5. The twelve officials were Brigadier General Yitzhak Mordechai, chief infantry and paratroop officer, who had allegedly struck the prisoners with a pistol; five Shin Beth agents; three soldiers; and three police officers, all of whom were among a larger group that had beaten and kicked the hijackers after their capture. D. SHIPLER, *supra* note 1, at 89-90.

6. See Friedman, *Israel Clears a General in 2 Arab Deaths*, N.Y. Times, Aug. 19, 1985, at A3, col. 4.

7. D. SHIPLER, *supra* note 1, at 90.

8. *The Verdict on Shamir*, N.Y. Times, Dec. 31, 1986, at A2, col. 3. The newspaper *Haaretz* quoted "a senior jurist" as saying that "the Government took advantage of the fact that at the head of the prosecutor's office stands a new attorney general who has not yet studied all the directives of his predecessor." Elon, *Ram Caspi and Yaakov Ne'emam Convinced Herzog to Grant the Pardon to the Head of the Shin Beth*, *Haaretz* (Israeli daily newspaper, Hebrew), June 26, 1986, at 1, col. 4.

mined that the police investigation could not be stopped.⁹

On June 25, 1986, President Haim Herzog, after consultation with various members of the Government, granted full, unconditional pardons to the head of the Shin Beth, Avraham Shalom, and three of his senior aides.¹⁰ The pardons covered the events of the night of the hijacking as well as all subsequent events up to the signing of the letters of pardon. The move was widely seen in the press as a "deal" worked out by the Government as a way to avoid an investigation that would almost certainly implicate its top officials.¹¹ Once the pardons had been granted, Attorney General Harish announced: "Now that the President, by virtue of his authority, has granted a full pardon to the head of the Shin Beth before the police opened any investigation, it appears that there is no longer any reason for an investigation."¹²

The President, the national "head of state" in Israel's parliamentary form of government, in which real political power resides in the Prime Minister and the Government itself, had acted under apparent authority of Basic Law: The President of the State,¹³ which grants him the "power to pardon offenders and to lighten penalties by the reduction or commutation thereof."¹⁴ The pardons immediately set off a wave of criticism and protest in the press and in legal circles. The newspapers carried statements the next day by noted legal scholars, questioning the authority of the President to pardon prior to conviction and even investigation and indictment.¹⁵

Several private attorneys filed petitions with the Supreme Court,¹⁶ challenging the validity of the pardons, claiming that the President had exceeded his authority. The petitions also asked the Court to order the police to open an investigation, claiming that it was under statutory obligation to do so.¹⁷

9. Elon, *supra* note 8.

10. *Id.* For a detailed discussion of the political maneuverings leading up to the granting of the pardons, see Maariv, Special Supplement, July 18, 1986, at 20-27.

11. See Maariv, Special Supplement, July 18, 1986, at 20-27.

12. Elon, *supra* note 8.

13. Basic Law: The President of the State, 18 L.S.I. 111 (1964) [hereinafter Basic Law: President].

14. *Id.* at 112, § 11(b).

15. See, e.g., Bracha, *Great Doubt Concerning Legality of the Pardon*, Haaretz, June 26, 1986, at 1, col. 1; *The Idea of Pardon—Deviation from the Rule of Law; Interview with Prof. H. Klinghoffer*, *id.* at 2, col. 7.

16. The Supreme Court's jurisdiction is explained *infra* note 31 and accompanying text.

17. See *infra* text accompanying notes 23-31.

The Supreme Court, in a lengthy and detailed opinion issued within five weeks of the filing of the petitions, upheld the validity of the pardons by a 2-1 vote. The decision, which ended merely one stage of a political and legal controversy that shook Israel and attracted world-wide attention, has major implications for human rights and the rule of law in the State of Israel. At issue were secrecy and security in a democracy under constant threat from hostile elements, a democracy that yet prides itself on justice and the rule of law.

The President of Israel, an honorary figurehead who is said to symbolize the State and be above politics, in this case descended to the political battlefield in the supposed interest of national security. In so doing, he politicized an office that has traditionally been non-political and that has always been held in the highest public esteem. His actions sent a message to the country—that leaders and agents of the security forces can break the law, can commit murder, perjury, and obstruction of justice, and do not then have to be brought to justice themselves. To all this the Supreme Court acquiesced, refusing to break with what it saw as the established law of the land, that the President's pardoning power, despite his otherwise powerless position, is absolute. It was not for these judges, said the majority, to break with tradition. Any change in the existing legal practice should come from the legislature.

The primary goal of this article is to analyze critically the Supreme Court's decision. In order to set the stage for the decision, Section II examines the petitions to the Supreme Court. Section III outlines preliminary developments in the stages between the filing of the petitions and the issuance of the Court's decision five weeks later. Section IV outlines the Supreme Court's decision, concentrating on the major points the Court chose to analyze. Section V, in turn, critically examines the Court's decision. Section VI traces post-decision developments, first in the Shin Beth Affair itself, and then briefly in a second Supreme Court decision, the *Nafsu* case, which also involved the Shin Beth and allegations of illegal interrogation practices by its agents. Section VI concludes with a brief discussion of the Landau Commission, which was established in the wake of the *Nafsu* affair to investigate and report on allegations of a pattern of abuses by the Shin Beth in its investigations. Finally, Section VII presents recommendations for reform of the law that has been interpreted by the Supreme Court to permit the President to issue pre-conviction pardons.

Since this article's primary goal is to analyze the Court's decision

upholding the Presidential pardons in the Shin Beth Case, its analysis is limited by the Court's. It must be acknowledged at the outset, however, that the precise issue before the Court, though surely "constitutional" in nature, was not the real issue. That issue, which was never presented to the Court and is thus beyond the scope of this article, is the question of how to control a secretive security agency charged with protecting a democratic country against the very real dangers of terrorism. What methods may the security agency employ to investigate and to interrogate witnesses? What kind of oversight can or should there be of the agency's actions? To whom should it be accountable? What kinds of procedures should there be to investigate alleged abuses by the security forces? How much may be known to the public of the agency's functioning? The Israeli Supreme Court's decision in the so-called Shin Beth Affair did not answer these questions. Indeed, they are the subject of continued scrutiny in Israel still today. But the Court did touch upon a number of these questions in the course of its analysis and so began a debate that has been ongoing.

The Shin Beth Affair, or so much of it as is dealt with in the Court's 1986 decision, can be seen as a turning point for the Shin Beth and for Israel. For although the President's pardons were upheld in this particular case, there developed an awareness of fundamental problems in the functioning of the Shin Beth, of a pattern of abuses never before revealed to the public. This pattern of abuses came to light as a result of events that can be seen as a direct outgrowth of both the Shin Beth Affair and of a new sensibility on the part of the Israeli public and legal establishment.¹⁸

II. THE PETITIONS TO THE SUPREME COURT

Several private attorneys filed individual petitions with the Supreme Court in its function as the High Court of Justice.¹⁹ In some of the petitions, the attorneys, civil rights and political activists, acted on their own initiative; others represented groups of politicians.²⁰ In

18. The subsequent events, including the Supreme Court's decision in the *Nafsu* case in May 1987 and the Landau Commission of Inquiry, which issued a report in November 1987, are beyond the scope of this article. They are described briefly *infra*, Section VI, text accompanying notes 196-232.

19. The Supreme Court's function as the High Court of Justice is explained *infra* note 31 and accompanying text.

20. At the preliminary hearing stage, on June 30 and July 1, 1986, there were five individual petitions, which the Court consolidated for argument. One of the petitioners was Amnon Zichroni, a private attorney and civil rights activist, for whom the author of this article worked during the summer of 1986 under the auspices of the Columbia Human Rights Internship

one petition, twelve university law professors joined as petitioners and were represented by a single attorney.²¹ Following the preliminary hearing, the families of the two Palestinian hijackers who had been beaten to death joined as petitioners.²²

The petitioners all shared two basic objectives: first, they asked the Court to compel the police to investigate the killing of the Palestinian hijackers at the hands of the Shin Beth agents; and second, they challenged the validity of the pardons granted by President Herzog.

A. *The Request for a Police Investigation*

Once details of the murders were made public in the spring of 1986, various complaints were filed with the police, requesting that they begin an investigation.²³ Amnon Zichroni²⁴ filed a complaint with the police on June 24, 1986 that reported both the murders of the Palestinian hijackers and the various obstructions of justice that followed.²⁵ He requested that the police begin an investigation in com-

program. Zichroni's petition was typical of those filed in that it named multiple defendants, and this article will make specific reference to his petition.

Zichroni's petition named nine individual defendants: the Commissioner of Police; the Attorney General; the Minister of Justice; the President of the State of Israel; Avraham Shalom, the head of the Shin Beth; Shalom's three aides who received pardons along with him and who remained anonymous; and Yitzhak Shamir, Vice-Prime Minister and Foreign Minister, who was Prime Minister at the time of the hijacking in April 1984. Zichroni Petition for Order to Show Cause at 1 [hereinafter Zichroni Petition].

21. High Court [hereinafter H.C.] 448/86. The petitioners were represented by Michal Shaked.

22. H.C. 463/86. The petitioners were Mohammed Abdullah Abu-Jama'a and Shahda Hussein Abu-Jama'a, relatives of the two Palestinians who had been beaten to death, who were cousins named Majdi and Subhi Abu-Jama'a. See D. SHIPLER, *supra* note 1, at 88. The families were represented by Felicia Langer.

23. Among the complaints filed with the police was that of the former Attorney General, Prof. Yitzhak Zamir. See Zichroni Petition at 2.

24. See *supra* note 20.

25. Zichroni's complaint to the police read as follows:

(a) Two of the hijackers of the bus who were captured alive by the I.D.F. [Israel Defense Forces, i.e., the Army] on April 13, 1984 found their death afterward while in custody. It is suspected that the two were murdered, allegedly in accordance with an order of the head of the General Security Service (Shin Beth), who acted in this matter on an order from and/or with the knowledge of then-Prime Minister, Mr. Yitzhak Shamir.

(b) During the various investigative and legal proceedings in this matter that ensued, it is suspected that there was a complex array of obstructions of justice, allegedly on orders of the head of the Shin Beth, who acted in this matter under the orders of and/or with the knowledge of and/or the support and authorization of then-Prime Minister, Mr. Yitzhak Shamir.

Brief for Zichroni at 2-3 (quoting the complaint). The "Brief for Zichroni," which was filed with the Court in July 1986, after the preliminary hearings, is to be distinguished from

pliance with the Criminal Procedure Law, which states that "[a]ny person may complain to the police that an offence has been committed,"²⁶ and states further that if the police "learns that an offence has been committed" and that the offense is a felony,²⁷ "it shall open an investigation."²⁸

In a letter to the Police Commissioner on June 26, 1986, Zichroni emphasized that the Presidential pardons, even if valid, did not remove the police's obligation to investigate. He pointed out that other individuals who had not received pardons almost certainly were involved; specifically, then-Prime Minister Shamir, who was in command of the Shin Beth at the time of the hijacking, had not received a pardon.²⁹

Zichroni's petition to the Supreme Court stated that the law's mandatory language created a legal obligation that the police must fulfill, and that the High Court of Justice was empowered to order the police to perform its duty. Supreme Court precedent supported this position and recognized a petitioner's standing to sue to enforce the law where a statutory obligation existed, even absent "personal injury" of the kind required by federal courts in the United States.³⁰

Zichroni's Petition, *see supra* note 20, which was filed in late June, prior to the preliminary hearings.

26. Criminal Procedure Law (Consolidated Version), 36 L.S.I. 35, 47, § 58 (1982).

27. The reported offenses included murder or manslaughter and their solicitation; perjury; obstruction of investigation; fabrication of evidence; and conspiracy to commit felony. All of these offenses constituted "felonies." Zichroni Petition at 4. *See also* Brief for Zichroni at 4 (citing Penal Law, L.S.I. Special Edition §§ 26, 27, 237, 238, 245, 298, 300, 499 (1977)).

28. Criminal Procedure Law, 36 L.S.I. at 47, § 59. The provision states in full:

Where the police, whether, by a complaint or in any other manner, learns that an offence has been committed, it shall open an investigation. However, in the case of an offence other than a felony, a police officer of the rank of *pakad* (captain) or over may direct that no investigation shall be held if he is of the opinion that no public interest is involved or if another authority is legally competent to investigate the offence.

The police are given discretion as to how to proceed in the case of an "offence" that is not a "felony." The clear implication is that in the case of an offense that is a felony, the police "shall open an investigation"—i.e., that the law grants the police no discretion in the matter.

29. Letter from Amnon Zichroni to Commissioner of Police (June 26, 1986).

30. Zichroni cited *Segal v. Minister of the Interior*, 34(IV) Piske Din [P.D.] (Law Reports of the Supreme Court of Israel, Hebrew) 429, 434 (1980), in which Justice Barak stated for the Supreme Court:

Where the law places an obligation on one of the authorities of government, and that authority refuses to carry out the obligation for reasons that it believes are within its discretion—believing that according to the correct interpretation of the law the obligation must be removed because of its discretion—this Court will not allow that governmental authority to cloak itself in the assertion that the petitioner lacks standing in order to prevent this Court from giving the law its correct interpretation.

The Israeli Supreme Court is specifically empowered to order a governmental authority to act when the law creates such an obligation.³¹

B. *The Challenge to the Validity of the Presidential Pardons*

In granting the pardons to the head of the Shin Beth and his three aides, the President acted under apparent authority of Basic Law: The President of the State,³² which gives him the "power to pardon offenders and to lighten penalties by the reduction or commutation thereof."³³ President Herzog was aware of the controversial nature of the pardons he granted, and he took the unusual step of making a public announcement on television on the night of June 25, 1986, explaining the reasons for his decision:

I know that my decision is not simple and that not everyone will agree with it, but I am familiar with both sides of the issue, both as a jurist and as one who served as the head of intelligence services in the Israel Defense Forces. I do not say that there is no truth to the claims of those who oppose this action, but when I weighed the considerations on both sides, I had to accept the responsibility and decide in accordance with the public good as it appeared to me, according to my knowledge and my conscience.³⁴

The petitioners asserted that the President had exceeded his authority, since the law's use of the term "offenders"³⁵ necessarily re-

The Supreme Court of the United States has continued to require "personal injury" as a prerequisite to a plaintiff's being allowed to present a claim in a federal court and has consistently asserted that citizens do not have a legal interest in enforcement of the law. *See, e.g., United States v. Richardson*, 418 U.S. 166 (1974); *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974). *See infra* Section IV(B), text accompanying notes 55-58.

31. Courts Law, 11 L.S.I. 157, 158, § 7 (1957) provides in pertinent part:

(a) The Supreme Court sitting as a High Court of Justice shall deal with matters in which it deems it necessary to grant relief in the interests of justice and which are not within the jurisdiction of any other court or tribunal.

(b) Without prejudice to the generality of the provisions of subsection (a), the Supreme Court sitting as a High Court of Justice shall be competent—

...

(2) to order State authorities, local authorities and officials of State authorities or local authorities, and such other bodies and individuals as exercise any public functions by virtue of law to do or refrain from doing any act in the lawful exercise of their functions. . . .

32. 18 L.S.I. 111 (1964).

33. *Id.* at 112, § 11(b).

34. Elon, *supra* note 8, at 2, col. 3 (quoting the President's announcement).

35. "Offenders" is the word used in the Justice Ministry's official English translation of the law (published in the series Laws of the State of Israel). The Hebrew term used in the law, "*avaryanim*," is no clearer on the question of whether it includes someone who has not yet been convicted. However, a standard dictionary definition of the word *avaryan* (singular form) suggests that it refers to one who has committed an act that is a violation of law: "One who

stricted the pardon to the post-conviction stage; until such time, the accused is innocent and thus cannot be considered an "offender." Despite previous statements in dicta by the Supreme Court that the President's pardoning power was absolute and included the authority to pardon prior to conviction,³⁶ this question had in fact never been in direct issue and thus had not been decided by the Court. Zichroni attached to his petition to the Supreme Court an official directive of the former Attorney General, Yitzhak Zamir, which stated unequivocally that "the President of the State is authorized, in accordance with Section 11(b) of Basic Law: President of the State, to grant pardons only to one who has been convicted in a court of law."³⁷ Although the President is immune from legal action "in respect of anything connected with his functions or powers,"³⁸ it is clearly established law that if the President exceeds his authority and in fact acts without authority, his *action* can be subject to judicial review, in what has been referred to as an "indirect attack."³⁹

commits an offense." An example provided is: "The offender was brought to trial." A. EVEN-SHOSHAN, HAMILON HEHADASH (The New Dictionary) 952 (Hebrew, 1983). The Supreme Court did not resort to the dictionary definition, analyzing the word in context instead.

36. See *infra* text accompanying notes 59-62.

37. Directive of the Attorney General 21.333, quoted in Zichroni Petition at 6; also referred to in Brief for Zichroni at 11.

38. Basic Law: President, 18 L.S.I. at 113, § 13(a).

39. In Attorney General v. Matana, 16 P.D. 430 (1962), the Supreme Court entertained a petition that claimed that the President lacked the authority to grant a conditional pardon. While Basic Law: President (1964) had not yet been enacted, the Transition Law, 3 L.S.I. 3, § 6 (1949), granted to the President the power "to pardon offenders and to reduce punishments." Presidential immunity was guaranteed at that time by the State President (Tenure) Law, 6 L.S.I. at 5, § 9(a) (1951), which provided: "The President shall not be called to account before any court or tribunal in respect of a matter relating to his functions or powers. . . ."; and by § 9(b), which provided: "No legal action shall be taken against the President during his tenure of office." Despite this *personal* immunity, the Court went to the merits of the petition, holding that the President did indeed have the authority to grant a conditional pardon.

The *Matana* case, discussed more fully *infra* text accompanying notes 108-18, was actually a rehearing by a five-justice panel of the Supreme Court of the original appeal, in which a three-justice panel had ruled, per Justice Berinson, that the President did not have the authority to grant a conditional pardon. *Matana v. Attorney General (Matana I)*, 14(II) P.D. 970 (1960). Upon the "further hearing," before a five-justice panel, provided for in Courts Law, 11 L.S.I. at 158, § 8, the Supreme Court reversed the earlier ruling. *Matana I*, however, contains an important discussion of Presidential immunity, an obstacle that the Court had to overcome in order to invalidate the conditional pardon granted by the President. This part of the holding was not overruled by the Court in the rehearing. Justice Berinson acknowledged that the President enjoyed immunity "in respect of a matter relating to his functions or powers," by virtue of § 9(a) of the State President (Tenure) Law, 6 L.S.I. at 5. Nevertheless, he stated:

If the President acts in a manner not in relation to his functions, he is, like any other citizen, subject to the laws of the State and to the authority of the courts. Such is the

Finally, the main thrust of Zichroni's petition attacked the pardons on the conceptual ground that the pre-conviction pardon violated the principle of separation of powers. According to this view, which Zichroni expanded in his brief, "it was not the intent of the legislature to create competition between the powers of the President and the powers of the other branches of government as clearly defined by law, branches that are subject to oversight by the courts and by the Attorney General."⁴⁰ Were the situation otherwise, the President would be able to frustrate the purposes of the other branches of government.

III. PRELIMINARY DEVELOPMENTS

The various petitions were filed with the Supreme Court in the days following the pardons of June 25, 1986. The Court consolidated the petitions and ordered oral argument to take place immediately before its most senior panel of justices.⁴¹ Oral argument was set for

case if the President purports to act within the scope of his functions and authority but in fact exceeds them, for the courts must interpret the law in order to determine the boundaries of the President's legal functions and power. . . . It is true that section 9(b) of the State President (Tenure) Law provides that "[n]o legal action shall be taken against the President during his tenure of office," and that this means that even if the President were to perform an act beyond his legal authority during his tenure in office or even if he committed an illegal act, a court does not have the authority to prosecute him while he is still President. This immunity continues only for the duration of his tenure and ends at the completion thereof, in contrast to the immunity granted by section 9(a) of the law, which protects him against any legal action at any time, after his tenure as well as during it. *But this does not mean that it is impossible to examine indirectly, without the President himself appearing as a party, the legality of his actions and exercises of power that injure individuals.* . . . In this case, the President exercised a power not granted to him, and thus it is a matter that exceeds his functions and power. . . . Before us stands an order for review, and incidentally the discussion requires us to decide whether the President's act was legal. This we are empowered to do, since we are not judging the President, but rather the legality of his act.

Matana I, 14(II) P.D. at 979-80 (emphasis added).

Justice Berinson's reasoning was implicitly endorsed by the Court upon the rehearing in *Matana*, since the Court entertained the petition challenging the legality of the President's conditional pardon.

An English translation of the rehearing of the *Matana* case (*Matana II*) was published in 4 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 112 (1962) [hereinafter S.J.]. All subsequent references will be to the English translation. The author of this article has compared the translation against the original for accuracy and has made adjustments where necessary.

40. Brief for Zichroni at 10. See also *id.* at 10-11. This point is touched upon briefly in the petition for an order to show cause, as well. Zichroni Petition at 6.

41. The head of the Supreme Court has the title of "*Nassi*," which means "president." To avoid confusion with the President of the State, the head of the Supreme Court, Meir Shamgar, will be referred to as the Chief Justice (C.J.). The "Vice-President" of the Court,

June 30.

At this preliminary stage the petitioners asked the Court to issue an order to show cause directing the Police Commissioner and Attorney General to detail why there should not be an investigation. The petitioners also asked the Court to direct the President to justify his pardons.⁴²

The Court first decided, after three hours of oral argument, to strike the President as a defendant.⁴³ This decision was in accordance with Basic Law: President, which provides: "The President of the State shall not be amenable to any court or tribunal, and shall be immune from any legal act, in respect of anything connected with his functions or powers."⁴⁴ The hearing continued into the night and then resumed the next day.

At the close of the hearing on the evening of July 1, 1986, after a total of more than ten hours of oral argument over the two days, the justices retired to chambers for about half an hour. When they returned, Chief Justice Shamgar read the Court's decision. The recipients of the pardons were ordered to provide declarations to the Court within seven days, detailing the process of the requests for pardons. The President's own considerations did not have to be detailed. The Court would then decide, based on the declarations, whether to issue a preliminary injunction or order further argument on the issue. The Court issued an order with regard to the police investigation, instructing the concerned parties to show cause why the police should not investigate the complaints presented to it, and to reply within 14 days. The decision was unanimous.⁴⁵

Miriam Ben-Porat, will be referred to as the Vice-Chief Justice (V.C.J.). The third justice who heard the petitions was Aharon Barak.

The Supreme Court consists of nine justices. A decision of a three-justice panel of the Court may be appealed, at the discretion of the Court, to a panel of five or more justices. Courts Law, 11 L.S.I. at 158, § 8(a).

42. *E.g.*, Zichroni Petition, *supra* note 20. See *supra* Section II, text accompanying notes 19-40.

43. Shargai, *Shin Beth Head: All My Actions Were Authorized*, Haaretz, July 1, 1986, at 1, col. 4.

44. 18 L.S.I. at 113, § 13(a).

45. Shargai, *High Court of Justice Issues Order to Detail Why Shin Beth Affair Should Not Be Investigated*, Haaretz, July 2, 1986, at 1, col. 1. The text of the order was as follows:

It has been decided that the respondents are to provide within 7 days affidavits describing the process of the requests for the pardon that is the subject of these petitions, including the grounds for their requests.

There is no need to provide an affidavit relating to the President's considerations in the matter of the pardon. Once the affidavits are received, the Court will decide whether it will hear additional claims relating to the pardon and whether the Court

On July 19, Attorney General Harish recommended to Prime Minister Peres and Foreign Minister Shamir that an official commission of inquiry⁴⁶ be established to investigate the entire affair. Peres's Labor Party supported the idea, while Shamir, unprotected by a Presidential pardon and fearful of being implicated, vehemently opposed it.⁴⁷ On July 14, the Government voted 14-11 not to establish a commission of inquiry, with the Labor ministers voting in favor of establishing a commission, and the Likud Party's ministers, headed by Shamir, opposing it.⁴⁸ Thereupon, Attorney General Harish announced that he would inform the Supreme Court of his intention to order the police to investigate the claims made in the complaints presented to it.⁴⁹ On July 15, he so informed the Court. Legal sources were of the opinion that the complaints would empower the police to investigate not only agents of the Shin Beth, but also the political echelon, including Vice-Prime Minister Yitzhak Shamir.⁵⁰ It was reported in the press that, in light of the Attorney General's decision to order a police investigation, ten additional Shin Beth agents, who had allegedly been involved in the murder of the Palestinian hijackers and the subsequent coverup, planned to request Presidential pardons. Legal sources suggested that if the Supreme Court upheld the four pardons being challenged, the President would have no choice but to pardon the other agents as well.⁵¹

IV. THE SUPREME COURT'S DECISION⁵²

A. *Introduction and Summary of Holding*

After a second round of oral argument, on July 20, 1986, the

will see a need for the issuance of an order nisi [i.e., an order to show cause] as to the validity of the pardons.

Order nisi as to the question of an investigation, as requested in the petitions, assuming that the pardons are valid. Time for reply: 14 days. The decision is unanimous.

Order Nisi as Requested in the Petitions, Haaretz, July 2, 1986, at 1, col. 5.

46. See *supra* note 4 (discussing commissions of inquiry).

47. Maariv, Special Supplement, July 18, 1986, at 19.

48. Eldar, *By 14-11 Majority the Government Rejects the Suggestion of a Commission of Inquiry*, Haaretz, July 15, 1986, at 1, col. 4.

49. Elon, *Harish to "Haaretz": Today I Will Announce to the High Court That I've Decided to Order the Police to Begin an Investigation*, Haaretz, July 15, 1986, at 1, col. 1.

50. *Id.*

51. Eldar, *More Than Ten Additional Shin Beth Agents Are About to Appeal to the President for Pardons*, Haaretz, July 15, 1986, at 1, col. 1.

52. The decision, handed down on August 6, 1986, was issued, in Hebrew, in a 160-page typescript, including the concurring and dissenting opinions. The case has since been published in the official Supreme Court Reports series known in Hebrew as *Piske Din*. The

Supreme Court issued its opinion on August 6. The three justices were unanimous on the question of the police investigation: the issue had been rendered moot by the Attorney General's July 15 announcement that there would be an investigation, and by his statements at oral argument that the investigation would be comprehensive.⁵³

On the question of the pardons themselves, Chief Justice Shamgar and Vice-Chief Justice Ben-Porat voted to uphold their validity, while Justice Barak dissented from this holding. In his words, "the pardon that the President of the State granted to the head of the Shin Beth and his three aides is null and void, since the President acted without authority."⁵⁴

B. Standing

The Supreme Court's original jurisdiction as fixed by law is quite broad, and its role as the High Court of Justice is generally viewed as the overseeing of government action.⁵⁵ The Court has, however, developed a discretionary system of prudential concerns to limit its caseload; there is a general requirement that a plaintiff show "personal injury" and that his claim not be a generalized one common to all citizens.⁵⁶

Nevertheless, the Israeli Supreme Court has shown willingness to entertain "public actions" in extraordinary cases, despite the absence of the type of "personal injury" that an American federal court would require. Chief Justice Shamgar, in affirming that the petitioners had standing to bring these claims, stated:

Even if it is true that none of these petitioners has an actual and direct personal interest in the invalidation of the pardons, this is not a reason to reject their claims outright. For this Court has

case is composed of seven individual petitions, which are simply listed in the official reporter in the order in which docket numbers were assigned to them. The case is thus formally listed as *Barzilai v. Government of Israel*, 40(III) P.D. 505 (1986). References will be to the official reporter but will use the name *Shin Beth Case*. The individual petitions' docket numbers are as follows: H.C. (High Court of Justice) 428/86; 429/86; 431/86; 446/86; 448/86; 463/86; 320/86.

53. *Shin Beth Case*, 40(III) P.D. at 565 (opinion of Shamgar, C.J.); *id.* at 583-84 (Ben-Porat, V.C.J., concurring); *id.* at 586-87 (Barak, J., concurring on the question of the police investigation).

54. *Id.* at 585 (Barak, J., dissenting).

55. See Courts Law, 11 L.S.I. at 158, § 7. See also *supra* note 31 and accompanying text. See generally Shapira, *Judicial Review Without A Constitution: The Israeli Paradox*, 56 TEMP. L.Q. 405 (1983).

56. See, e.g., *Ashkenazi v. Minister of Defense*, 30(III) P.D. 309, 316-17 (1976) (Shamgar, J.).

already stated in the past that in certain circumstances when the question raised is of a constitutional nature and is of a public character that directly impacts on the rule of law, it is desirable to take a more liberal stance and open the Court's doors to such a petitioner. . . .^{57]} In the matter before us, the problems raised involve the interpretation of Basic Law: President of the State for the purpose of determining the scope of the President's pardoning power, and thus we are justified in taking the liberal approach alluded to above by opening the Court's doors before the petitioners.⁵⁸

C. Case Law Precedent

The Court relied heavily on the two cases in which the President's pardoning power had been at issue. It looked to previous Supreme Court statements regarding the President's power to pardon before conviction. Especially important to the Court's present decision was *Attorney General v. Matana*,⁵⁹ which the Court referred to as "the most basic and comprehensive decision on the subject of the pardoning authority."⁶⁰ In *Matana*, Vice-Chief Justice Agranat embraced his earlier statement in *Reuven v. Chairman and Members of the Law Council*,⁶¹ reaffirming that the President's pardoning power "is parallel, in its nature and in respect of the consequences which flow from its exercise, to the power of pardon exercised by the King of England. . . . The President has the power to pardon offenders both before and after conviction, either unconditionally, or with qualifications."⁶² While Chief Justice Shamgar noted that this statement had not been the holding in the earlier case, *Reuven*, he emphasized that Justice Agranat's view of the scope of the pardoning power was an integral part of his opinion and was therefore to be accorded great weight.⁶³

57. Shin Beth Case, 40(III) P.D. at 558-59. See also *Zichroni v. Broadcasting Authority*, 37(I) P.D. 757, 762-63 (1983); *Shiran v. Broadcasting Authority*, 35(III) P.D. 365, 374 (1981); *Segal v. Minister of the Interior*, 34(IV) P.D. 429, 434-35 (1980); *id.* at 440-43 (Barak, J., concurring).

58. Shin Beth Case, 40(III) P.D. at 559. Justice Barak concurred on this point. *Id.* at 586 (Barak, J., concurring with regard to petitioners' standing).

59. 16 P.D. 430, 4 S.J. 112 (1962).

60. Shin Beth Case, 40(III) P.D. at 521.

61. 5 P.D. 737 (1951).

62. *Matana*, 4 S.J. at 116 (quoting *Reuven*, 5 P.D. at 751 (Agranat, J., dissenting)).

63. Shin Beth Case, 40(III) P.D. at 520-21.

D. Comparative Approach—Reliance on English and American Views of Pardon

Justice Agranat, in his opinion in *Reuven*,⁶⁴ made extensive reference both to the English monarch's and American President's pardoning powers. In Justice Agranat's view, by discovering the nature of the pardoning power of the English monarch and the American President, the heads of state of the two common law countries that served as models for the Israeli system of government, he could discover the proper nature of the pardoning power of the Israeli President. Justice Agranat found that the King's pardoning power was absolute and included the power to pardon before conviction.⁶⁵ So, too, the American President's power was broad, including the power to grant full as well as conditional pardons, both before and after conviction.⁶⁶ Justice Agranat concluded: "From this I learn that the [Israeli] President has the authority to pardon offenders both before and after conviction, either unconditionally, or with qualifications."⁶⁷

Chief Justice Shamgar referred to this reasoning and embraced it, writing:

[W]hile it is true that the subject is a matter of new and independent Israeli legislation, yet for the purpose of understanding its nature it is permissible to be aided by reference to parallel powers in those countries that served as a comparative model from which the legislature drew when our law was enacted.⁶⁸

E. Legislative Action and Inaction

The *Reuven* and *Matana* cases were decided before the Basic Law was enacted in 1964. Prior to its enactment, the President's powers were delineated in the Transition Law (1949),⁶⁹ which em-

64. 5 P.D. 737 (1951).

65. *Id.* at 746-47 (Agranat, J., dissenting). See 8 HALSBURY'S LAWS OF ENGLAND *Constitutional Law* ¶ 949 (4th ed. 1974) [hereinafter HALSBURY]. But see *infra* notes 148-55 and accompanying text (explaining inappropriateness of relying on the English model).

66. *Reuven*, 5 P.D. at 748, 750 (Agranat, J., dissenting). See *Ex parte Grossman*, 267 U.S. 87 (1925); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380-81 (1866). See also *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) (Marshall, C.J.) (Supreme Court will look to English law for rules prescribing the manner in which the pardoning power is to be used). But see *infra* notes 156-63 and accompanying text (explaining inappropriateness of relying on the American model).

67. *Reuven*, 5 P.D. at 751 (Agranat, J., dissenting).

68. *Shin Beth Case*, 40(III) P.D. at 522.

69. 3 L.S.I. 3 (1949).

powered him "to pardon offenders and to reduce punishments."⁷⁰

The issue in *Matana* was actually whether this statutory language empowered the President to issue a conditional pardon. The Supreme Court held that it did.⁷¹ Vice-Chief Justice Agranat's opinion was wide-ranging and sought to describe the scope of the President's pardoning authority generally.⁷² In so doing, he stated that the President's power included the authority to pardon before conviction.⁷³

In 1964, when the Knesset enacted Basic Law: President, it changed the language of the pardon provision to include "the power to pardon offenders and to lighten penalties *by the reduction or commutation thereof*,"⁷⁴ thus specifically embracing the Supreme Court's holding in *Matana* regarding conditional pardons. The Knesset did not change the law with respect to the power to pardon prior to conviction. From this silence, Chief Justice Shamgar reasoned that the Knesset, which was obviously aware of the *Matana* decision when it passed the new law, implicitly accepted the Court's broad reading, including the power to pardon before conviction.⁷⁵

F. Statutory Language—the Meaning of the Term "Offenders"

The term "offenders" is not defined in the Basic Law or in the Penal Law.⁷⁶ Chief Justice Shamgar adopted what he saw as the "plain meaning" of the term "offender"—that it meant someone who had *committed* an "offense" as defined by law, and did not require that the person be convicted of that offense in order to be eligible to receive a pardon.⁷⁷ He specifically referred, for purposes of compari-

70. *Id.* § 6.

71. For a description of the case, see *infra* text accompanying notes 108-18.

72. See *supra* text accompanying notes 59-62.

73. 4 S.J. at 116.

74. 18 L.S.I. at 112, § 11(b) (emphasis added).

75. Shin Beth Case, 40(III) P.D. at 525-26.

76. Penal Law, L.S.I. Special Edition (1977). Chief Justice Shamgar himself so noted. Shin Beth Case, 40(III) P.D. at 529.

77. Shin Beth Case, 40(III) P.D. at 530 (emphasis in original):

According to the plain meaning of the words, an offender is one who *has committed* an act defined as an offense, and there is nothing in the term itself to suggest that the legislature employed the terms "offense" and "offender," as the case may be, to refer specifically to one against whom it has been proven, in a criminal adjudication that ends in conviction, that the individual committed an offense.

Chief Justice Shamgar, having noted that the term "offender" is not defined in Basic Law: President, see *supra* note 76 and accompanying text, compared other usages of the term in various statutes to support this interpretation. For example, he cited section 3 of the Police Ordinance (New Version) (1971), which provides that the "Israel police force shall engage in

son, to the provision in the U.S. Constitution giving the President the "power to grant reprieves and pardons for offenses against the United States,"⁷⁸ which has been interpreted by the U.S. Supreme Court to include the power to issue pre-conviction pardons.⁷⁹

G. *Holding vs. Dictum in Reuven and Matana*

Chief Justice Shamgar acknowledged that the broad statements in *Reuven* and *Matana* regarding the President's pardoning power were, strictly speaking, dicta, but he nevertheless concluded:

The holding of the majority in *Matana* is the conclusion that the President's power is in fact the product of an original and independent Israeli law, but that nevertheless the legislature intentionally designed it in accordance with the English and American systems, which served as prototypes.⁸⁰

Chief Justice Shamgar further observed that the broad statements in *Matana* regarding the pre-conviction pardon and the pardoning power generally were in fact an integral part of the justices' view of the power, and as such were not to be dismissed merely because they went beyond the narrow issue of the case.⁸¹

H. *Nature of the Pardoning Power*

The Court undertook an analysis of the nature of the pardoning power of heads of state of various countries throughout the world, both common law and non-common law. It found that "there is not one model only and that almost every legal system has developed a special approach that corresponds appropriately to the other governmental authorities that exist within it."⁸² It found that the fact that in France and Germany, for example, the President is empowered to pardon only *after* conviction was not instructive, since those nations

the prevention of offenses and in their discovery, *in the apprehension of offenders*, and in their prosecution." Shin Beth Case, 40(III) P.D. at 530 (quoting Police Ordinance). Chief Justice Shamgar placed emphasis on the phrase "in the apprehension of offenders" for the purpose of demonstrating that the term "offenders" in this context obviously referred to individuals who had not yet been convicted.

78. U.S. CONST. art. II, § 2 (emphasis added).

79. Shin Beth Case, 40(III) P.D. at 532. See, e.g., *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380-81 (1866). See also *supra* note 66 and accompanying text; *infra* notes 156-60 and accompanying text.

80. Shin Beth Case, 40(III) P.D. at 533.

81. *Id.*

82. *Id.* at 550. See Sebba, *The Pardoning Power—A World Survey*, 68 J. CRIM. L. & CRIMINOLOGY 83 (1977).

had not served as models for the Israeli legislature when it granted the pardoning power to the President.⁸³

The Court explained that in analyzing the pardoning power, the nature of the power itself, and not the particular governmental authority exercising it, should be emphasized. Thus, the nature of the President's office was immaterial. The concept of pardon in the Anglo-American system was clear, and this was the background against which to determine the scope of the Israeli President's pardoning power.⁸⁴

I. Nature of the Basic Law

All three justices agreed that the Basic Law, which defined the President's powers, was constitutional in nature, even in the absence of a formal, written constitution.⁸⁵ They did not agree, however, on the significance this had when it came to interpreting the law.

Chief Justice Shamgar, writing for the majority, found that the law's constitutional quality required that it be interpreted with a "spa-

83. Shin Beth Case, 40(III) P.D. at 551.

84. *Id.* at 549-52.

85. The so-called "Basic Laws," sometimes referred to as "Fundamental Laws," are individual acts of legislation that define the functions of the various governmental bodies. This subject is a complex one that has troubled Israeli legislators and legal scholars and is beyond the scope of this article. For present purposes it must suffice to say that the Israeli legislature, the Knesset, originally intended to adopt a written constitution. However, this was not done, and instead it was decided to create individual laws defining the functions and powers of the various governmental bodies. In this way, a constitution would be built up "chapter by chapter." See generally H. SACHAR, A HISTORY OF ISRAEL 356-57 (1976). The Transition Law, 3 L.S.I. 3 (1949), which defined the functions of the Knesset, the President of the State, and the Government, and was the predecessor to the Basic Laws, was referred to by the Supreme Court in *Matana* as "a 'constitution' in miniature." 4 S.J. at 120.

It is generally agreed that the Basic Laws, like the Transition Law before them, are of a constitutional nature, despite their being enacted in the same way as ordinary legislation. The "constitutional nature" of the Basic Laws takes on great significance when a court attempts to interpret them. See *infra* text accompanying notes 164-69.

The Basic Laws enacted to date, in addition to Basic Law: President (1964), are: Basic Law: The Knesset, 12 L.S.I. 85 (1958); Basic Law: Israel Lands, 14 L.S.I. 48 (1960); Basic Law: The Government, 22 L.S.I. 257 (1968); Basic Law: The State Economy, 29 L.S.I. 273 (1975); Basic Law: The Army, 30 L.S.I. 150 (1976); Basic Law: Jerusalem, Capital of Israel, 34 L.S.I. 209 (1980); Basic Law: Adjudication (1984) (not yet published in L.S.I.). For further discussion, see L. Kohn, *Foreword to FUNDAMENTAL LAWS OF THE STATE OF ISRAEL* (Badi ed. 1961); A. RUBINSTEIN, *HAMISHPAT HAKONSTITUTSIYONI SHEL MEDINAT YISRAEL* (Constitutional Law of the State of Israel) 276-90 (Hebrew, 3d ed. 1980); Gavison, *The Controversy Over Israel's Bill of Rights*, 15 ISRAEL Y.B. ON HUM. RTS. 113 (1985); Shamgar, *On the Written Constitution*, 9 ISRAEL L. REV. 467 (1974). See also *Bergmann v. Minister of Finance*, 23(I) P.D. 693 (1969) (Held: A law contradicting an "entrenched provision"—i.e., a provision that requires a special majority of the Knesset to amend it—of a Basic Law is null and void.).

cious view," and that this led to a finding that the pardoning power was broad.⁸⁶ He also suggested that the law's constitutional quality required that any change from settled practice be made only after the most searching inquiry.⁸⁷

J. National Security vs. The Rule of Law

The petitioners had claimed that the President's pardons would serve to shield the truth, even given the fact that there would be a police investigation. They urged that the rule of law not be subordinated to supposed concerns of national security. Petitioner Zichroni wrote in his brief to the Court:

The entire affair creates the impression that things were done that no developed country should allow to be swept under the rug. The "purity of arms" of the security forces, as well as the integrity of the investigatory authorities, who everyday investigate dozens of citizens, and who give testimony before courts in Israel and the Occupied Territories, are matters that go to the very soul of the society, matters that impact upon all citizens of this country.⁸⁸

The Court found, however, that the rule of law had a different meaning from that urged upon it. The Court acknowledged that "a proper government is one that guards the existence of the rule of law, for that is what serves as a guard-wall against anarchy . . . and ensures human rights."⁸⁹ But, the Court continued, a government is not able to function properly unless it possesses full knowledge of all that takes place within its territories.⁹⁰ The Court concluded that "[t]his does not require that everyone know everything; to the contrary—there are certain circumstances, certain subjects, and certain details that although they are governed by law, knowledge of them is reserved to a select few."⁹¹ Thus, a full investigation into the killing of the Palestinian hijackers, including prosecution of the Shin Beth agents involved, would result in revealing information regarding the operations

86. Shin Beth Case, 40(III) P.D. at 521. In this context, Chief Justice Shamgar cited the *Matana* case, in which Vice-Chief Justice Agranat referred to Justice Frankfurter's statement in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 596 (1952) (Frankfurter, J., concurring), that interpreting the Constitution "requires . . . a spacious view." *Matana*, 4 S.J. at 123.

87. Shin Beth Case, 40(III) P.D. at 548.

88. Brief for Zichroni at 16.

89. Shin Beth Case, 40(III) P.D. at 555.

90. *Id.* The reference is to the intelligence services, namely the Shin Beth, which is responsible for internal security and the fight against terrorism.

91. *Id.*

of the intelligence forces and would damage national security.⁹²

K. Standard of Review

The Court determined that the Basic Law's language, "[t]he President of the State *shall have power* to pardon offenders,"⁹³ granted to the President discretionary authority with which the Court should not interfere.⁹⁴ The Court explained that it may determine whether a governmental authority has acted as an authority *of its stature* is supposed to act. The degree of deference to the authority's actions depends on the nature of the governmental body. The Court does not substitute its judgment for that of the administrator, but rather "interferes only when it is of the opinion that no reasonable governmental authority of its defined status could have arrived at the conclusion that it did."⁹⁵

Various petitioners questioned whether the President had had sufficient information on which to base his decision. But the Government in its response to the Court stated that the President was presented with "full information" and that he met twice with one of the recipients of the pardons.⁹⁶ The Court noted that it was unusual that he meet with a recipient at all.⁹⁷ The Court concluded that once it was certain that the President had had full information regarding the nature of the crimes that had been committed, both from the oral and written confessions made by the four men who requested the pardons, there was no room for the Court to interfere with the President's exercise of discretion.⁹⁸

92. Vice-Chief Justice Ben-Porat explained in her concurring opinion that when the pardoning power is used there is a conflict between two important interests—equality before the law, which requires that everyone who commits a crime be brought to justice; and protecting some essential interest for which the pardon was granted. In this case, the President had weighed the interests and determined that essential national security concerns dictated that the pardons be granted. *Id.* at 574-75 (Ben-Porat, V.C.J., concurring).

93. 18 L.S.I. at 112, § 11(b) (emphasis added).

94. Shin Beth Case, 40(III) P.D. at 556-57. The Court quoted an earlier opinion in which it had stated: "Even if the President acted on mistaken advice or even if the President erred in exercising his discretion, this would not affect the legal validity of his decision. This Court does not sit to consider appeals against the President's decisions." *Barzilai v. Prime Minister of Israel*, 31(III) P.D. 671, 672 (1977).

95. Shin Beth Case, 40(III) P.D. at 557.

96. *Id.*

97. *Id.*

98. *Id.*

V. ANALYSIS AND CRITICISM OF THE DECISION

A. *The Precedents Relied upon by the Court Were Not Dispositive of the Issue*

The decisions of the Supreme Court are binding upon all lower courts, while the Supreme Court itself is not bound by its own previous decisions.⁹⁹ Still, the Court is reluctant to depart from what it sees as settled precedent. The two cases relied upon by the Supreme Court in the present case, however, were not dispositive of the question of the President's authority to pardon before conviction.

1. *Reuven v. Chairman and Members of the Law Council*¹⁰⁰

Reuven, an attorney, was convicted in 1944 of a crime under section 109 of the Criminal Code Ordinance (1936)¹⁰¹ and was sentenced to six months in prison. After he had served his sentence, the Law Council decided to revoke his license.¹⁰² Upon the establishment of the State of Israel in 1948, Reuven requested a Presidential pardon, which was granted in 1950 as a means of helping him return to his former profession. After the pardon, Reuven requested that the Law Council return his name to the Roll of Advocates so that he could resume his practice. The Council refused, and Reuven brought suit in the High Court of Justice to compel the Council to restore his license.¹⁰³

99. Courts Law, 11 L.S.I. at 163, § 33.

100. 5 P.D. 737 (1951).

101. Reuven's offense was not detailed in the report of the case. Section 109 of the Criminal Code Ordinance of 1936 deals with "public officers receiving property to show favour," according to the marginal notation, and provides as follows:

Any person who, being employed in the public service, receives any property or benefit of any kind for himself, on the understanding, express or implied, that he shall favour the person giving the property or conferring the benefit, or any one in whom that person is interested, in any transaction then pending, or likely to take place, between the person giving the property or conferring the benefit, or any one in whom he is interested, and any person employed in the public service, is guilty of a misdemeanour, and is liable to imprisonment for two years or to a fine of one hundred pounds or to both such penalties.

Criminal Code Ordinance No. 74 of 1936, Supplement No. 1 to the Palestine Gazette Extraordinary No. 652 of 14th December 1936, in 1 GOVERNMENT OF PALESTINE, ORDINANCES, REGULATIONS, RULES, ORDERS AND NOTICES, ANNUAL VOLUME FOR 1936, at 319.

102. The Law Council was charged with licensing and regulating the legal profession in Mandate Palestine. Law Council Ordinance No. 33 of 1938, in 1 GOVERNMENT OF PALESTINE, ORDINANCES, REGULATIONS, RULES, ORDERS AND NOTICES, ANNUAL VOLUME FOR 1938, at 105-07.

103. *Reuven*, 5 P.D. at 739-44.

The High Court held that the Law Council was not authorized by law to *return* an individual's name to the Roll of Advocates once it had been stricken for cause and that therefore the Court could not order the Council to act.¹⁰⁴

Reuven had pleaded his Presidential pardon, claiming that it served to erase his guilt, thus removing the basis upon which the Council had revoked his license. But the Court declared that, having determined that the Council did not have the power to return a name to the Roll, it need not reach the question of the effect of the pardon.¹⁰⁵

Justice Agranat, in dissent, argued that the effect of the President's pardon was to erase the guilt of the convicted man, thus removing the basis for the Council's action. He relied upon English and American views of pardon as serving to erase guilt and make the individual, as it were, a new man.¹⁰⁶ He examined the English and American views of pardon generally in order to determine the scope and effect of pardons in common law systems, finding that both the English monarch and the American President had absolute power to issue pardons at any stage of legal proceedings. He concluded: "From this I learn that the President [of Israel] has the authority to pardon offenders both before and after conviction, whether unconditionally or conditionally; additionally, that the granting of an unconditional pardon serves to erase the conviction and to remove all penalties resulting therefrom."¹⁰⁷

Justice Agranat's opinion, however, was a dissent and ranged far beyond the question in issue. Therefore, the Supreme Court was mistaken in relying on its analysis when it decided the Shin Beth Case.

104. *Id.* at 744-45.

105. *Id.* at 745 (opinion of Heshin, J.). Justice Zilberg concurred. *Id.*

106. *Id.* at 745-56 (Agranat, J., dissenting). In support of his view of the pardoning power of the British monarch, Justice Agranat cited *Hay v. Justices of the Tower Division of London*, 24 Q.B.D. 561 (1890). For a discussion of *Hay*, see *infra* note 153. See also 8 HALSBURY, *supra* note 65, ¶ 952 ("The effect of a pardon under the Great Seal is to clear the person from all infamy, and from all consequences of the offence for which it was granted, and from all statutory or other disqualifications following upon conviction. It makes him, as it were, a new man . . ."). In support of his view of the American President's pardoning power, Justice Agranat cited *Ex parte Grossman*, 267 U.S. 87 (1925), and *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380-81 (1866). For a discussion of the American President's pardoning power, see *infra* notes 156-63 and accompanying text.

107. *Reuven*, 5 P.D. at 751.

2. *Matana v. Attorney General*¹⁰⁸

Matana involved a challenge to the President's authority to grant a conditional pardon. The Supreme Court held that the Transition Law (1949),¹⁰⁹ granting the President the power "to pardon offenders and to reduce punishments,"¹¹⁰ included the authority to grant conditional pardons.

Matana had been convicted of attempted murder and sentenced to three years in prison.¹¹¹ After he had served sixteen months of the sentence, President Yitzhak Ben-Zvi issued a "Warrant for the Reduction of Punishment," substituting for the three-year sentence the sixteen months already served and adding the condition that if *Matana* committed any of a set of specified offenses he was to serve an additional twenty months in prison.¹¹² *Matana* later committed a second offense of attempted murder in breach of the condition attached to the pardon, for which the district court sentenced him to four years' imprisonment and in addition activated the conditional sentence of twenty months to run consecutively with the four-year sentence.¹¹³ *Matana* challenged the conditional pardon on the grounds that the President had exceeded his authority.¹¹⁴ The Supreme Court held that the Transition Law empowered the President to grant a conditional pardon.¹¹⁵

Vice-Chief Justice Agranat, this time writing for the majority, stated: "The narrow and specific problem . . . is whether the President is empowered to impose any conditions on the grant of a pardon or reduction of a sentence in a particular case."¹¹⁶ Nevertheless, he em-

108. 16 P.D. 430, 4 S.J. 112 (1962).

109. 3 L.S.I. 3 (1949).

110. *Id.* § 6.

111. The criminal appeal to the Supreme Court is reported in *Attorney General v. Matana and Yosef*, 10 P.D. 142 (1956). The co-defendant, Naim Yosef, was acquitted.

112. *Matana*, 4 S.J. at 115.

113. *Id.* at 116.

114. *Id.*

115. The Court's specific holding on the validity of the conditional pardon appears at 4 S.J. at 142. For a similar American case, with a similar result, see *Schick v. Reed*, 419 U.S. 256 (1974).

The *Matana* case was actually a rehearing by a five-justice panel of the Supreme Court of the original appeal, in which a three-justice panel had ruled, per Justice Berinson, that the President did not have the authority to grant a conditional pardon. *Matana v. Attorney General (Matana I)*, 14(II) P.D. 970 (1960). See *supra* note 39 (discussing the Court's analysis of Presidential immunity). The Court's decision in *Matana I* was unanimous: Justices Zilberg and Landau concurred without opinion. 14(II) P.D. at 980.

116. 4 S.J. at 115.

braced his earlier statements in *Reuven*¹¹⁷ and once again sought to describe the President's pardoning power generally. While this time in the majority, his statements regarding the pardoning power generally, including his statement that "the President has the power to pardon offenders both before and after conviction,"¹¹⁸ were beyond the question in issue and thus not part of the holding of the case.

3. The Court Was Not Bound by Its Previous Statements

Basic Law: Adjudication (1984) states: "A decision rendered by the Supreme Court is binding upon all courts except the Supreme Court."¹¹⁹ *Reuven* and *Matana*, as we have seen, were not binding precedents. Even if *Matana* was considered a precedent on the question of pre-conviction pardon, however, the Supreme Court need not have been bound by it.

The courts in Israel recognize the distinction between holding and dictum. Justice Barak, dissenting in the Shin Beth Case, quotes a statement by Justice Agranat in a recent article: "Once the Supreme Court has interpreted a provision of a law *that was at issue in the dispute before it as it saw it*, this interpretation becomes part of the law."¹²⁰ But, Justice Barak emphasized,

this statement is true only with regard to the holding of the case and not with regard to dicta. The rationale for this is that the judge does not feel the same responsibility when he writes dicta as when he writes the actual holding of a case. Since he knows that dicta are not binding, he is likely to feel freer with regard to them.¹²¹

B. The President's Pardoning Power Should Be Interpreted in the Overall Context of His Powers

It is submitted that the Court's approach to the question at issue, by which it viewed the institution of pardon as a neutral principle

117. See *supra* text accompanying notes 106-07.

118. 4 S.J. at 116 (quoting *Reuven*, 5 P.D. at 751 (Agranat, J., dissenting)).

119. Basic Law: Adjudication § 20(b) (1984) (not yet published in L.S.I.), quoted in Barak, *Overruling Precedent*, 21 ISRAEL L. REV. 269, 269 (1986) (citing SEFER HAHUKIM no. 1110, at 78).

120. Shin Beth Case, 40(III) P.D. at 616 (Barak, J., dissenting) (quoting Agranat, *The Contribution of the Judicial Branch to the Making of Law*, 10 IYUNEI MISHPAT [Tel Aviv U.L. Rev.] 233, 244 (Hebrew, 1983-84) (emphasis added)).

121. Shin Beth Case, 40(III) P.D. at 616 (Barak, J., dissenting).

having universal meaning,¹²² was mistaken. If it is a constitution we are expounding, and all agree that the Basic Laws are constitutional in nature,¹²³ then we must look at the President's place in the overall governmental structure.

The President of Israel is a figurehead largely devoid of substantive powers. His position is representative and symbolic; he is said to symbolize the State.¹²⁴ Professor Klinghoffer, a noted constitutional authority, writes:

His powers are formal and have no decisive weight in the constitutional structure of the State. The President of the State is not elected by the people; he does not have a veto power against the laws passed by the Knesset; and he does not have the power to dissolve the Knesset. He has no authority to appoint administrators; and he is not the Commander-in-Chief of the Israel Defense Forces.¹²⁵

Similarly, Professor Rubinstein, another noted authority, writes: "Few heads of state . . . are as devoid of power as is the President of Israel."¹²⁶

Such a view of the office of the President is inescapable when the

122. In *Matana*, Vice Chief Justice Agranat stated:

Not only do the expressions "pardon" and "reduction of punishments" have a universal meaning, but the power of pardon, in its scope under the common law, is the power which passed to the Provisional Government by virtue of Section 14 of the Law and Administration Ordinance, 1948, and was known to local jurists at the time when that provision was framed.

4 S.J. at 134. Even more telling is the approach taken by Justice Cohen in his concurring opinion in *Matana*. To discern the meaning of the modern Hebrew verb *lahon* (to pardon; root *h-n-n*), he looked to its usage in the Bible:

The expression "pardon" in the Hebrew language has from earliest times involved an element of free and unfettered will, even of arbitrariness. The phrase "and I will be gracious to whom I will be gracious [*ahon*, root *h-n-n*, i.e., I will pardon], and I will show mercy on whom I will show mercy" (Exodus 33:19) is interpreted by Rashi to mean "I shall be gracious on those occasions that I wish to be gracious."

Id. at 148 (Cohen, J., concurring). Justice Cohen did not say that the quoted words from Exodus are spoken by no mere mortal, nor even by an elected figurehead of government, but by God Himself.

123. See *supra* note 85.

124. See *Union of Travel and Tourism Agents in Israel v. Koppel Tours Ltd.*, 29(II) P.D. 799, 800 (1975) ("The President symbolizes the State."); *Matana v. Attorney General (Matana I)*, 14(II) P.D. 970, 979 (1960) ("With the intention of protecting the honor of the State that the President personifies . . . he was granted a certain immunity to suit . . ."), *rev'd on other grounds*, 16 P.D. 430, 4 S.J. 112 (1962) ("further hearing" in accordance with Courts Law, 11 L.S.I. at 158-59, § 8).

125. H. KLINGHOFFER, *MISHPAT KONSTITUTSIYONI* (Constitutional Law) 489 (Hebrew, 1965).

126. A. RUBINSTEIN, *HAMISHPAT HAKONSTITUTSIYONI SHEL MEDINAT YISRAEL* (Constitutional Law of the State of Israel) 391 (Hebrew, 3d ed. 1980).

Basic Law is examined as a whole. Although the law begins by stating that "a President shall stand at the head of the State,"¹²⁷ it has been urged that "an erroneous conclusion as to the status and importance of the Presidency in Israel ought not to be drawn therefrom."¹²⁸ In Israel, the President is not the head of the executive branch; rather, executive powers are concentrated in the hands of the Government.¹²⁹ Of the 27 sections of Basic Law: President, only section 11 deals with the President's "functions and powers," as the marginal notation states.¹³⁰ Section 11(a) delineates, in six subsections, several ministerial functions, each of which uses the mandatory language "shall." The President thus performs these functions, such as signing every law,¹³¹ without the possibility of exercising any discretion.¹³² Section 11(c) states that the President "shall carry out every other function and have every other power assigned to him by Law."¹³³ This has only led to the President's being assigned more formal duties, such as opening the Knesset.¹³⁴

In fact, the President's only substantive "power" is that of the pardon, in section 11(b). That power must, in turn, be interpreted with regard to the office as a whole. In this regard, it is instructive to

127. 18 L.S.I. at 111, § 1.

128. Bracha, *The Constitutional Position, the Pardoning Power and Other Powers of the President of the State of Israel*, 9 ISRAEL Y.B. ON HUM. RTS. 190, 190 (1979).

129. Basic Law: The Government provides: "The Government is the executive authority in the State." 22 L.S.I. 257, § 1 (1968).

130. Section 11 of Basic Law: The President of the State provides in full as follows:

(a) The President of the State—

- (1) shall sign every Law, other than a law relating to his powers;
- (2) shall take action to achieve the formation of a Government and shall receive the resignation of the Government in accordance with Law;
- (3) shall receive from the Government a report of its meetings;
- (4) shall accredit the diplomatic representatives of the State, shall receive the credentials of diplomatic representatives sent to Israel by foreign states, shall empower the consular representatives of the State and shall confirm the appointments of consular representatives sent to Israel by foreign states;
- (5) shall sign such conventions with foreign states as have been ratified by the Knesset;
- (6) shall carry out every function assigned to him by Law in connection with the appointment and removal from office of judges and other office-holders.

(b) The President of the State shall have power to pardon offenders and to lighten penalties by the reduction or commutation thereof.

(c) The President of the State shall carry out every other function and have every other power assigned to him by Law.

18 L.S.I. at 112.

131. *Id.* § 11(a)(1).

132. Bracha, *supra* note 128, at 194, 203-13.

133. 18 L.S.I. at 112, § 11(c).

134. Bracha, *supra* note 128, at 213.

compare the Israeli President to the American President, who holds "[t]he executive power"¹³⁵ and who is "Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States."¹³⁶ It is also instructive to note that a federal district court, in dismissing a challenge to the validity of President Ford's pardon of Richard M. Nixon, wrote: "The Court observes that the Pardoning Power is in the same section of the Constitution which makes the President Commander-in-Chief of the armed forces."¹³⁷ The Israeli President's pardoning power, on the other hand, should be informed by its place within a structure of formal duties that carry with them no discretion and that have no substantive effect on the workings of the State.¹³⁸

C. Reliance on the Comparison to the Pardoning Powers of the English Monarch and American President Is Misplaced

The Court sought to discover the nature of the President's pardoning power by analyzing the pardoning powers of the English monarch and the American President.¹³⁹ Before criticizing this comparative approach, it must first be understood why it would be undertaken at all. If the Israeli President's pardoning power had been delegated to him in some way, such a comparison might be profitable. But such is not the case. Chief Justice Shamgar himself noted that "the subject is a matter of new and independent Israeli legislation."¹⁴⁰

During the period of the British Mandate, 1922-1948, Great Britain ruled Palestine through an officer of the Crown known as the High Commissioner. His duties and powers, which were delegated to him by the King, included the power to pardon an accomplice to a crime so as to allow the accomplice to give evidence to aid in the prosecution of the principal offender. The High Commissioner was also empowered to "grant to any offender *convicted* of any crime or

135. U.S. CONST. art. II, § 1.

136. *Id.* § 2.

137. *Murphy v. Ford*, 390 F. Supp. 1372, 1373 (W.D. Mich. 1975). *See also* *McCord v. Ford*, 398 F. Supp. 750 (D.D.C. 1975) (same result); *Williams v. United States*, 82-1 T.C. 9138 (S.D. W. Va. 1981) (taxpayer challenge to President Ford's pardon of Richard Nixon rejected).

138. For discussions of the Israeli President's office generally, see B. AKZIN, *MISHPAT KONSTITUTSIYONI* (Constitutional Law) 253-93 (Hebrew, 1966); H.E. BAKER, *THE LEGAL SYSTEM OF ISRAEL* 12-20 (1968), H. KLINGHOFFER, *supra* note 125, at 489-521; A. RUBINSTEIN, *supra* note 126, at 391-400; Bracha, *supra* note 128.

139. *See supra* Section IV(D), text accompanying notes 64-68.

140. *Shin Beth Case*, 40(III) P.D. at 522.

offence . . . a pardon, either free or subject to lawful conditions.”¹⁴¹ The High Commissioner was the chief executive officer of the Crown in Mandate Palestine.¹⁴² His powers were strictly delegated powers, and their content was to be determined by reference to the source from which they emanated—that is, the King.

Not so the office of the President of Israel. The position was created as the result of a political compromise by Israel's first Prime Minister, David Ben-Gurion, to provide a position of prominence to Dr. Chaim Weizmann. Dr. Weizmann had for many years been the President of the World Zionist Organization and enjoyed great prestige among the Jewish population in Palestine and abroad. Ben-Gurion sought to create an honorary position of symbolic importance, without relinquishing the Government's executive authority. The office of the President of the State was the result.¹⁴³

The President's functions were first set forth in the Transition Law of 1949.¹⁴⁴ This power was, as Justice Agranat wrote in *Matana*, “an original power which finds its proper place in a document which is the ‘Constitution in miniature’ of an independent State. . . . [T]he Israeli legislature neither copied nor omitted, but built its law as an independent structure.”¹⁴⁵ Thus, it is clear that the President's powers were not delegated to him by any foreign authority. The only question that remains is whether the Knesset *modeled* the Presidency on the English or American examples.

Justice Barak addressed this question at length in his dissent. He sought to determine the intent of the legislature, and he sought to identify what models, if any, it had used in framing the Transition Law. The proceedings of the Constitution and Law Committee of the

141. Palestine Order in Council § 16 (1922), in 3 THE LAWS OF PALESTINE 2574 (H. Drayton ed. 1934) (emphasis added). The full provision reads:

When any crime or offence has been committed within Palestine, or for which the offender may be tried therein, the High Commissioner may, as he should see occasion, grant a pardon to any accomplice in such crime or offence who shall give such information and evidence as shall lead to the conviction of the principal offender or of any such offenders if more than one; and further may grant to any offender convicted of any crime or offence in any court or before any Judge, or Magistrate, within Palestine a pardon, either free or subject to lawful conditions, or any remission of sentence passed on such offender, or any respite of the execution of such sentence, for such period as the High Commissioner thinks fit, and may, as he shall see occasion, remit any fines, penalties or forfeitures which may accrue or become payable in virtue of the judgment of any Court or Magistrate in Palestine.

142. *Id.* § 5.

143. Bracha, *supra* note 128, at 190-92, 222-24.

144. 3 L.S.I. 3, ch. 2.

145. 4 S.J. at 124.

Knesset are closed, and Justice Barak noted that the Court did not have access to the protocols of those meetings. Former Attorney General Zamir had viewed the protocols, however, and Justice Barak quoted his statement that the legislature had intended to grant the President the authority to pardon only after conviction.¹⁴⁶ Justice Barak stated further, however, that the materials available to the Court were not sufficiently explicit on the issue of the source of "inspiration" for the pardoning power, and thus it fell to the Court to determine the question.¹⁴⁷

As discussed in the preceding section, the President's pardoning power should be determined in the context of his powers generally, as well as his constitutional position in the Israeli system of government. When viewed in this light, any reliance on the models of the English monarch or the American President is seen to be inappropriate.

The English monarch's pardoning power was thought traditionally to be part of the royal prerogative, the set of residuary, non-statutory powers reserved to the Crown.¹⁴⁸ The pardoning power was traditionally absolute,¹⁴⁹ and as part of the royal prerogative was not subject to judicial review.¹⁵⁰

But in fact the situation in England has changed to accommodate the changed nature of the monarchy. The power is actually exercised today by the Home Secretary, who is then accountable to Parliament.¹⁵¹ The potential arbitrariness of the power has thus been significantly mitigated. Moreover, it appears that the pre-conviction pardon, which traditionally was used for the sole purpose of obtaining the testimony of an accomplice to aid in prosecution of the primary offender,¹⁵² has fallen into disuse.¹⁵³ Some commentators have

146. Shin Beth Case, 40(III) P.D. at 593 (Barak, J., dissenting).

147. *Id.*

148. See generally 8 HALSBURY, *supra* note 65, ¶¶ 889-1082; H.W.R. WADE, *ADMINISTRATIVE LAW* 213-15 (5th ed. 1982).

149. See 8 HALSBURY, *supra* note 65, ¶¶ 949-52.

150. *Id.* ¶ 951.

151. A.T.H. Smith, *The Prerogative of Mercy, the Power of Pardon and Criminal Justice*, 1983 PUBLIC LAW 398, 426.

152. *Id.* at 413.

153. S.A. DE SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 128 n.124 (1971) ("It would seem that a pardon may be granted *before* conviction; but this power is never exercised. The line between pardon before conviction and the unlawful exercise of dispensing power is thin.") (emphasis in original).

Although the specific question of the validity of a pre-conviction pardon does not appear to have been addressed by the English courts, the case law does reflect the erosion of the absolute nature of the pardoning power referred to by the commentators. The traditional

claimed that the power to grant pre-conviction pardons has in fact disappeared, atrophied as a result of disuse, though these claims are

position is presented in *Hay v. Justices of the Tower Division of London*, 24 Q.B.D. 561 (1890). In *Hay*, the appellant had been convicted of a felony and later pardoned by the Queen. He then applied to the licensing justices of the Tower Division to transfer to him the license of a fully-licensed public-house. They refused on the ground that, having been convicted of a felony, he was ineligible to receive such license by virtue of a statute, 33 & 34 Vict. ch. 29, § 14, which provided: "Every person convicted of felony shall for ever be disqualified from selling spirits by retail, and no licence to sell spirits by retail shall be granted to any person who shall have been so convicted as aforesaid." He appealed to quarter sessions against the refusal, and the court decided in favor of the appellant, finding that the effect of the free pardon was to remove the disqualification imposed by section 14 of the statute.

On appeal, the Queen's Bench Division affirmed the lower court's decision, describing in broad terms the scope of the monarch's pardoning power:

By the prerogative of the Crown the pardon extends far beyond the mere discharge of the prisoner from any further imprisonment. It is a purging of the offence. The King's pardon, says Hale, "takes away poenam et culpam": 2 P.C. 278. This points to the character, condition, and status of the convict. Again, in 2 Hawkins' P.C., s. 48, the author says that pardon "does so far clear the party from the infamy and all other consequences of his crime, that he may not only have an action for a scandal in calling him traitor or felon after the time of the pardon, but may also be a good witness. . . ." So in another text-book of authority, 1 Chitty's Criminal Law, 775, it is said that "the effect of a pardon like that of the allowance of clergy, is not merely to prevent the infliction of the punishment denounced by the sentence, but to give to the defendant a new capacity, credit, and character." Nothing could be more clear. These are only text-books; but let us turn to the authority of *Cuddington v. Wilkins* [(1615) Hob. 67, 81], where the plaintiff pleaded a general pardon, and on demurrer it was "adjudged for the plaintiff, for the whole Court were of opinion, that though he were a thief once, yet when the pardon came, it took away not only poenam, but reatum, for felony is contra Coronam et dignitatem Regis," and it goes on to say that "when the King has discharged it and pardoned him of it he hath cleared the person of the crime and infamy. . . ."

24 Q.B.D. at 564-65.

A recent opinion shows considerable erosion of this traditional view of the power of the royal pardon in England. In *Regina v. Foster*, [1985] 1 Q.B. 115 (C.A. 1984), the appellant had been granted a free pardon in respect of a rape that, it was discovered, he had in fact not committed. On appeal against the conviction, the Court of Appeal held that the effect of a free pardon was to remove from the subject of the pardon the penalties and punishments ensuing from a conviction, but it did not eliminate the conviction itself. The court observed: "[I]t is beyond doubt, so we think, that the effect of a free pardon upon the continuing existence of a conviction has not been considered by the courts for many years." *Id.* at 126. After reviewing the relevant decisions, both in England and throughout the Commonwealth, the court concluded:

[Counsel] has reminded us that constitutionally the Crown *no longer has a prerogative of justice*, but only a prerogative of mercy. It cannot, therefore, he submits, remove a conviction but only pardon its effects. The Court of Appeal (Criminal Division) is the only body which has statutory power to quash a conviction. With that we entirely agree.

Id. at 130 (emphasis added). Thus, while not addressing the question of the validity of a pre-conviction pardon, the statement by the Court of Appeals in *Foster* does indicate a recognition of the erosion of the royal prerogative with respect to the power of pardon generally, a fact that undermines the assertion of Chief Justice Shamgar that the monarch's pardoning power has not diminished. See *infra* text accompanying note 155.

disputed.¹⁵⁴ Chief Justice Shamgar acknowledged that the pre-conviction pardon has fallen into disuse in England, but asserted that the power had not thereby disappeared, and could be revived "in special circumstances."¹⁵⁵ Yet it must be acknowledged that if the power has fallen into disuse, this must be by design, and it would be preferable not to rely on its hypothetical continued existence for purposes of comparison.

The Court's comparison with the American President's pardoning power is similarly misplaced. The President of the United States holds "[t]he executive power"¹⁵⁶ and is "Commander-in-chief of the Army and Navy of the United States."¹⁵⁷ It is true that the United States Supreme Court has continually asserted that the President's pardoning power is absolute, "except in cases of impeachment," as stated in the Constitution.¹⁵⁸ The classic statement of the Court is in *Ex parte Garland*:¹⁵⁹

The power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. . . . The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.

While the American President's pardoning power is absolute, such a broad power comports with his overall power. But the comparison for purposes of determining the scope of the Israeli President's power is not instructive.

The American President's pardoning power was modeled after the English system and was created at a time when the King's power was still absolute. Well into the nineteenth century, the Supreme Court asserted that it would look to English law to discover the scope of the President's pardoning power.¹⁶⁰ It is doubtful whether such an

154. See S.A. DE SMITH, *supra* note 153, at 116; H.W.R. WADE, *supra* note 148, at 213; A.T.H. Smith, *supra* note 151, at 416-17.

155. Shin Beth Case, 40(III) P.D. at 540. See A.T.H. Smith, *supra* note 151, at 416-17.

156. U.S. CONST. art. II, § 1.

157. *Id.* § 2.

158. *Id.*

159. 71 U.S. (4 Wall.) 333, 380 (1866).

160. *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) (Marshall, C.J.):

The Constitution gives to the President, in general terms, "the power to grant reprieves and pardons for offenses against the United States."

As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles regulating the operation and effect of a

approach is still tenable today.

The American President's pardoning power has been criticized as a constitutional aberration, given that it is unchecked and grants to the President absolute discretion.¹⁶¹ The possibility for abuse was clearly seen in the case of President Ford's pardon of Richard M. Nixon in 1974.¹⁶² Still, as Justice Barak notes in his dissent, since the American President today, like the English King in the past, is responsible for executing the law, "there is a certain logic in granting him the authority not to execute it, by virtue of a pardon, in certain cases."¹⁶³

In sum, the American President's pardoning power, given his constitutional position and concomitant powers, is an inappropriate model for determining the scope of the Israeli President's pardoning powers.

D. "Constitutional" Interpretation

There is general agreement that the Basic Laws are constitutional in nature, even in the absence of a formal, written constitution.¹⁶⁴ The three justices in the Shin Beth Case did not agree, however, on the significance this had when it came to interpreting Basic Law: President. Chief Justice Shamgar, relying on earlier statements by Justice Agranat, found that the law's constitutional quality required that it be given a "spacious view," and that this meant that the power was broad.¹⁶⁵

Justice Agranat's reference had been to Justice Frankfurter's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁶⁶ in

pardon, and look into their books for rules prescribing the manner in which it is to be used by the person who would avail himself of it.

161. See, e.g., Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475 (1977).

162. See *id.* at 530-35.

163. Shin Beth Case, 40(III) P.D. at 599 (Barak, J., dissenting). Justice Barak is not alone in dissenting from the conclusions that have been drawn from the comparative approach. Justice Landau, dissenting in *Matana*, wrote: "Particularly in regard to the powers of the President of the State and the President of the United States, there exists in my view a fundamental difference between the constitutional character of these institutions here and in the United States which precludes any possibility of drawing comparisons between the two." 4 S.J. at 144 (Landau, J., dissenting). See also *Matana I*, 14(II) P.D. 970, 976-77 (1960) (arguing against reliance on comparison of Israeli President to English monarch), *rev'd*, 16 P.D. 430, 4 S.J. 112 (1962).

164. See *supra* note 85.

165. Shin Beth Case, 40(III) P.D. at 521.

166. 343 U.S. 579 (1952).

which the United States Supreme Court was asked to determine whether President Truman's seizure of the steel mills was within his constitutional powers. An examination of the full context of Justice Frankfurter's statements demonstrates that Chief Justice Shamgar, and Justice Agranat before him, misunderstood the lesson to be learned.

Justice Black, writing for the Court, held that President Truman had exceeded his authority.¹⁶⁷ Justice Frankfurter sought to describe a proper approach to constitutional interpretation:

The pole-star for constitutional adjudication is John Marshall's greatest judicial utterance that "it is a *constitution* we are expounding." *McCulloch v. Maryland*, 4 Wheat. 316, 407 [1819]. That requires both a spacious view in applying an instrument of government "made for an undefined and expanding future," *Hurtado v. California*, 110 U.S. 516, 530 [1884], and as narrow a delimitation of the constitutional issues as the circumstances permit. Not the least characteristic of great statesmanship which the Framers manifested was the extent to which they did not attempt to bind the future. It is no less incumbent upon this Court to avoid putting fetters upon the future by needless pronouncements today.¹⁶⁸

When viewed in its proper context, Justice Frankfurter's teaching is clear. A "spacious view" does not necessarily mean a broad power. It means that the instrument should be viewed in its larger context. Indeed, the United States Supreme Court held that President Truman had *exceeded* his authority. A "spacious view" means that many things may be considered, such as comparisons with other nations' constitutional systems, but that the proper conclusion must be drawn with regard to their applicability. Justice Barak emphasized that the other governmental bodies must be considered, that this, too, is part of a "spacious view," but that sometimes this led to an interpretation of the particular power involved as *narrow*. The view may be spacious, but the power in question may necessarily be restricted. This was such a case, for interpreting the Israeli President's pardoning power so as to include pre-conviction pardon caused a conflict with the other branches of government.¹⁶⁹

Moreover, Justice Frankfurter's statements regarding the narrow

167. *Id.* at 582-89.

168. *Id.* at 596 (Frankfurter, J., concurring) (emphasis in original).

169. *Shin Beth Case*, 40(III) P.D. at 617-18 (Barak, J., dissenting).

delimitation of constitutional issues, if heeded, would have prevented Justice Agranat from ever expressing a view with regard to pre-conviction pardon, since that question was never in issue in either *Reuven* or *Matana*.

E. Separation of Powers

Once it is determined that the existing case law is not dispositive of the issue at hand, that the President of Israel is a figurehead without any substantive power, that the examples of the English monarch and the American President are inappropriate models, and that the Basic Law need not be interpreted as granting the President broad powers, the task is made easier. The President must find his place among the branches of the governmental system of which he is a part; he is to be above politics, but he is not above the law.

Justice Barak writes in dissent:

From the commission of the crime until the time of conviction in a final judgment, different authorities operate upon the person suspected of the crime: the police investigate; the prosecution prosecutes; the court judges; the prison system imprisons. It is not consistent with the constitutional structure that the President's pardoning authority be interpreted so as to give him the power to intrude upon these other authorities' functions. It is not a desirable constitutional structure that the police investigate, yet the President is empowered to stop the investigation; that the prosecution prosecutes, yet the President is empowered to stop its prosecution; that the courts judge, yet the President is empowered to interfere at any stage of the judicial process.¹⁷⁰

Justice Barak thus rejected what the Court had seen to be the law as it is. He sought to define the law as it should be:

What, then, is the desirable interpretation of the pardoning power against the background of this constitutional structure? The desirable interpretation is that this power be used only after the other governmental authorities have completed their functions. If at such time a need arises for a pardon, the President would then be authorized to grant it.¹⁷¹

Such a position in fact finds support in previous statements of the Court. In *Reuven*, Justice Agranat, in reviewing the use of the pardon in England, noted that the main purpose of the pardon was to correct

170. *Id.* at 602 (Barak, J., dissenting).

171. *Id.*

injustice in the case of an innocent person convicted by error.¹⁷² He stated that in Israel the primary purpose of the pardon was similarly to correct injustice, and further that the secondary purpose was to reduce the punishment of the offender in circumstances justifying such action.¹⁷³ Both of these purposes clearly apply only to the post-conviction stage.

One of the justices dissenting in *Matana* addressed the issue more directly. Justice Berinson disagreed with the Court's broad interpretation of the President's pardoning power as including the authority to commute sentences, or, as he put it, "changing one punishment for another."¹⁷⁴ He felt that in so doing, the President was interfering with the courts' work:

I agree that the institution of the Presidency stands above the various authorities of the State in the sense that it symbolizes the State as a whole with all its institutions and authorities, but the President does not stand above any institution or authority in the sense that he may provide what it lacks or penetrate its area of activity or interfere with its work. . . . The institution of pardon was not designed to prevent, and is not capable of preventing, a generally undesirable social phenomenon. It is the nature of pardon that it deals with individual cases and extends kindness and mercy as a matter of exception to [he] who is worthy of it.¹⁷⁵

In view of the purposes of pardon, too, it would be restricted to the post-conviction stage. This approach finds support in the legal literature,¹⁷⁶ and serves to fit the pardon properly into the Israeli constitutional structure.

F. Accountability

The President of Israel is not directly accountable to anyone, and this is yet another reason to limit his free exercise of discretion in matters impacting so significantly on the nation's criminal justice system and on the rule of law. The President is not elected directly by the people, but rather by the Knesset in a secret ballot.¹⁷⁷ He is immune from legal process "in respect of anything connected with his

172. 5 P.D. at 748-49 (Agranat, J., dissenting).

173. *Id.* at 751.

174. 4 S.J. at 159 (Berinson, J., dissenting).

175. *Id.* at 157-58.

176. See, e.g., Feller, *Rehabilitation—A Special Legal Institution Required By Reality*, 1 MISHPATIM 497 (Hebrew, 1969).

177. Basic Law: President, 18 L.S.I. at 111, § 7.

functions or powers,"¹⁷⁸ and he cannot be criminally prosecuted.¹⁷⁹

The Basic Law does, however, contain a mechanism designed to provide some degree of accountability, if not oversight, but its effectiveness is dubious. Section 11 of the Basic Law defines the President's "functions and powers." As we have seen, however, his only real "power" is that of the pardon.¹⁸⁰ Section 12 provides: "The signature of the President of State on an official document, other than a document connected with the formation of a Government, shall require the countersignature of the Prime Minister or of such other Minister as the Government may decide."¹⁸¹ The government assigned to the Justice Minister the responsibility for countersigning letters of pardon.¹⁸²

The question to be asked is whether the countersignature provision provides effective oversight. The purpose of requiring the countersignature was to provide parliamentary accountability: the minister who countersigned the document was then answerable to the Knesset.¹⁸³ There is difference of opinion, however, as to the degree of discretion the Justice Minister may exercise in providing his countersignature.¹⁸⁴ The law clearly states that the President's signature "shall require the countersignature" of the designated minister, but it is not clear whether he must provide it. Dr. Leslie Sebba, for one, has expressed the view that the legislature intended to create a ministerial duty—that is, the Justice Minister *must* countersign the President's pardon. Even if he disagrees with the decision, he must countersign and defend the decision before the Knesset—or resign. In such a

178. *Id.* at 113, § 13(a).

179. *Id.* § 14.

180. See *supra* notes 124-34 and accompanying text.

181. 18 L.S.I. at 112, § 12.

182. H. KLINGHOFFER, *supra* note 125, at 519 (quoting Government directive of Apr. 17, 1948).

183. See Bracha, *supra* note 128, at 213-16. A similar practice has been developed in England, where governmental ministers act in the name of the Crown but are then accountable to Parliament for their actions. See H.W.R. WADE, *supra* note 148, at 49-50.

184. The various views are surveyed in A. RUBINSTEIN, *supra* note 126, at 395 & nn.42-43. Justice Agranat stated in *Matana* that "every instrument of pardon by the President requires the countersignature of the Prime Minister [or] other Minister." 4 S.J. at 136 (citing Transition Law, 3 L.S.I. at 3, § 7). But he was merely stating the requirement of the law. The practice is otherwise. Professor Klinghoffer expressed the view that the minister's obligation was dependent on the President's; where the President must act, as in the ministerial duties delineated in section 11(a), so, too, must the minister act, but where the President has discretion, as in the case of pardon, so, too, does the minister have discretion. H. KLINGHOFFER, HANINA B'YISRAEL (Pardon in Israel) 6 (Hebrew) (cited in A. RUBINSTEIN, *supra* note 126, at 398 n.43).

case, the Prime Minister or the succeeding Justice Minister would countersign the pardon.¹⁸⁵ Thus, according to this view, the countersignature requirement does not provide an effective check on the President's power.

The actual practice demonstrates that there is in fact no possibility for oversight. As explained by the Supreme Court in *Barzilai v. Prime Minister of Israel*:¹⁸⁶

The Basic Law: President of the State requires the countersignature of one of the Ministers of the Government to the signature of the President, and it is a constitutional custom that, in matters concerning a pardon, the Minister of Justice presents the President with all the requisite material to enable the latter to exercise his powers. *The Minister of Justice guarantees his countersignature to the President in advance, by recommending to the latter that the pardon be granted.*¹⁸⁷

In the case of the Shin Beth pardons, moreover, the countersignature process, reflecting the practice referred to above, was reversed. The Cabinet voted to recommend to the President that he grant the pardons. On the morning of June 25, 1986, President Herzog met with Justice Minister Modai, who informed him of the Cabinet decision. The Justice Minister then presented the letter of pardon, which he had *already* "countersigned," to the President for his signature, which the President provided.¹⁸⁸ The pardons were then effective.

The countersignature procedure is clearly not a sufficient guarantee against abuse in the case where, as here, the Government itself seeks a Presidential pardon to further its own ends. Some greater guarantee is needed.

Both Chief Justice Shamgar and Vice-Chief Justice Ben-Porat expressed hope in their opinions that the President would exercise restraint and use the pardoning power sparingly, and the pre-conviction pardon in only the rarest and most extreme circumstances.¹⁸⁹ To this, Justice Barak responded:

Constitutional norms are not built on the foundation of hopes.

185. Sebba, *The Pardoning Power—Prerogative of the President of the State*, 8 MISHPATIM 227, 247 (Hebrew, 1977).

186. 31(III) P.D. 671 (1977).

187. *Id.* at 672 (quoted in Bracha, *supra* note 128, at 201-02; translation of Bracha) (emphasis added).

188. Elon, *supra* note 8, at 2, col. 7.

189. Shin Beth Case, 40(III) P.D. at 553-54 (Shamgar, C.J.); *id.* at 581-83 (Ben-Porat, V.C.J., concurring).

Fundamental governmental principles must not be established on the assumption that everything will operate properly. To the contrary, the constitutional structure is based on the assumption that everything will not operate properly, and for this reason boundaries and limits must be established.¹⁹⁰

G. National Security vs. The Rule of Law

In the final analysis, the Shin Beth Affair did not turn on a legal question of statutory interpretation. Everyone knows what an "offender" is; everyone knows when the law has been broken; everyone knows when a murder has been committed. The question is what is to be done about it. The President felt that the requirements of national security dictated that the Shin Beth agents who had committed murder, perjury, and obstruction of justice should not stand trial. President Herzog stated that he had granted the pardons

with the purpose of putting an end to the devil's dance surrounding the affair and in order to prevent additional harm to the Shin Beth. . . . My decision was made with a profound awareness that the public good and welfare of the State require that we guard our security and protect the Shin Beth from the damage that would result were this affair permitted to continue.¹⁹¹

Chief Justice Shamgar noted that a government, in order to function properly, requires full knowledge of all that occurs within its territory. This knowledge serves national security. "But this does not necessarily require," he continued, "that everyone know everything. On the contrary, there are certain circumstances and certain classes of subjects and details, that although they are governed by law, knowledge of them is restricted to a very few select individuals."¹⁹²

Vice-Chief Justice Ben-Porat noted that the use of the pre-conviction pardon necessarily involved a conflict of interests, and thus a proper balancing was necessary to determine which should prevail. In this case, the principle of equality before the law was set against national security concerns. President Herzog had determined, she wrote, that the security concerns outweighed the interest in applying the law equally (by prosecuting all the parties who had committed

190. *Id.* at 606 (Barak, J., dissenting).

191. Statement of President Herzog, June 25, 1986, quoted in Shin Beth Case, 40(III) P.D. at 517-18.

192. Shin Beth Case, 40(III) P.D. at 555.

crimes), and his decision was to be honored.¹⁹³

In the final analysis, the Shin Beth Affair was about the conflict between the rule of law and the supposed needs of national security. The majority saw in this conflict a need to decide in favor of one over the other: the President made his decision in favor of national security, and this decision was to be honored. But it did not have to be this way. As Justice Barak wrote in dissent, the meaning of the rule of law is that everyone, including the various branches of the government, must act according to the law. Acts in defiance of the law must be met with sanctions. The executive, too, is beholden to the law.¹⁹⁴ He wrote:

Security concerns do not require a different result. There is no security without law. The rule of law guarantees national security. Security requires that we discover the proper tools to investigate. The strength of the Security Forces is in the public's faith in them. If security concerns take precedence, neither the public nor the courts will be able to have faith in the Shin Beth or in the legality of its investigations. Without public confidence, the system of government will not be able to function.¹⁹⁵

VI. POST-DECISION DEVELOPMENTS

A. *Developments in the "Original" Shin Beth Affair*

The Court's decision upholding the President's pardons was handed down on August 6, 1986. The Inspector-General of the Police had already assembled an investigatory team following the Attorney General's order of July 15 and had said he would head the team personally. The police were waiting only for the Supreme Court's decision.¹⁹⁶ As a result of the decision, there would now be an investigation.

The police announced that the special team would begin its work the following week.¹⁹⁷ But sources in the Justice Ministry stated that any investigation would be "for show only," since the other Shin Beth agents who had been involved in the murder of the Palestinian hijackers and the subsequent coverup would almost certainly receive Presi-

193. *Id.* at 574-75 (Ben-Porat, V.C.J., concurring).

194. *Id.* at 621 (Barak, J., dissenting).

195. *Id.* at 622.

196. Shapira, *Inspector General Will Personally Lead Investigation in Shin Beth Affair*, Haaretz, July 24, 1986, at 1, col. 6.

197. Shargai & Shapira, *Police Investigatory Team Has Prepared a List of Subjects*, Haaretz, Aug. 7, 1986, at 1, col. 1.

dential pardons themselves. Thus, any investigation would not lead to indictments.¹⁹⁸ It was also suggested that if the Shin Beth agents had difficulty obtaining pardons, the Attorney General would exercise his authority to stay legal proceedings against them.¹⁹⁹

Three weeks after the Court's decision, President Herzog granted pardons to seven additional Shin Beth agents who had been involved in the murders of the Palestinian hijackers.²⁰⁰ A senior legal source stated that the police investigation would proceed more easily now that the Shin Beth agents could give testimony to the police investigators without fear of self-incrimination. Other sources suggested that there was no purpose in continuing an investigation when all the suspects had already been pardoned. Still others expressed satisfaction with the additional pardons, claiming that the Shin Beth agents could now testify concerning the involvement of the political echelon in the killings and subsequent cover-up.²⁰¹ The investigation proceeded.

The head of the Shin Beth, Avraham Shalom, had agreed to resign in exchange for his pardon,²⁰² but his three senior aides, legal advisers within the security agency, sought to remain in their positions, claiming that the President's pardons had erased their guilt. Justice Ministry lawyers did not agree with this view, and refused to cooperate with the Shin Beth lawyers in the prosecution of suspected terrorists, claiming that they could not trust men who had admitted to falsifying documents and testimony as part of the plan to cover up the Shin Beth's killing of the two captured Palestinian hijackers.²⁰³

The controversy threatened to cripple the country's legal apparatus. Two of the three legal advisers soon agreed to resign their posts, but the third refused, remaining in his position until November 1986. Then he, too, resigned.²⁰⁴

In late December 1986, the special police investigatory commission announced its findings: Yitzhak Shamir, Prime Minister at the time of the hijacking in April 1984, and now Prime Minister once

198. *Id.*

199. *Id.* The Attorney General is granted this authority by the Criminal Procedure Law (Consolidated Version), 36 L.S.I. at 75, § 231(a) (1982).

200. Elon & Shapira, *Senior Legal Source: The Investigation Should Continue Only If the Political Echelon Is Investigated*, Haaretz, Aug. 25, 1986, at 1, col. 1.

201. *Id.*

202. Eldar, *Avraham Shalom: Shamir Gave Me General Authorization to Kill Terrorists Captured in Planned Attacks*, Haaretz, July 1, 1986, at 1, col. 3.

203. Friedman, *Israeli Lawyers in a Dispute: Ministry vs. Security Agency*, N.Y. Times, Sept. 30, 1986, at A4, col. 3.

204. *A Victory for Natural Justice* (editorial), Haaretz, Nov. 18, 1986, at 11, col. 1.

again, was cleared of any wrongdoing. No indictments whatsoever were recommended. The commission's findings left the impression that Avraham Shalom, the former head of the Shin Beth, had acted on his own initiative in ordering, and possibly participating in, the murder of the Palestinian hijackers.²⁰⁵ This, despite Mr. Shalom's statement to President Herzog in his request for a pardon that all his actions "were done with the approval and authorization" of those in charge of him—namely, then-Prime Minister Yitzhak Shamir.²⁰⁶ Shalom had also claimed that Shamir had given him general authorization to kill terrorists captured during attacks.²⁰⁷ Shamir's associates had denied these allegations.²⁰⁸

It is unclear whether Mr. Shamir did issue such a directive. Yet Mr. Shalom's assertion that he did served as the basis for President Herzog's pardons.²⁰⁹ The results of the investigation were widely criticized. One political journal protested:

Since the political echelon has now been "cleared," there is no one to stand trial. The lesson: in the State of Israel it is possible to murder prisoners, and no one has to be brought to justice for doing it. It is possible to fabricate testimony, lie to investigators and judges, and no one has to be brought to justice as a result.²¹⁰

Such a conclusion seems unavoidable.²¹¹

205. Friedman, *The Verdict on Shamir*, N.Y. Times, Dec. 31, 1986, at A2, col. 3.

206. Shargai, *Shin Beth Head: All My Actions Were Authorized*, Haaretz, July 1, 1986, at 1, col. 4.

207. Eldar, *supra* note 202.

208. *Id.*

209. See Michael, *Not Innocent, Not Pure*, Haaretz Weekend Supplement, Jan. 2, 1987, at 11.

210. *No One Is Guilty!*, HaOlam HaZeh (weekly political journal, Hebrew), Dec. 31, 1986, at 5.

211. In late January 1987, President Herzog, while touring an Army base, responded thus to a soldier's question regarding the pardons he had granted in the Shin Beth Affair: "The Shin Beth must be allowed to function." He emphasized that if the subject had been brought up for legal determination, it would have carried on for two years and everyone would have brought up incidents from the past. President Herzog referred to a recent incident concerning Mordechai Vanunu, an Israeli being tried for revealing to a British newspaper classified information regarding Israel's nuclear power plant at Dimona. Vanunu had communicated a message concerning his capture by Israeli security agents by showing a message written on his palm to news cameras while he was being moved from prison to court. President Herzog stated: "In a country that is not capable of transporting a prisoner from jail to the court without his communicating with the whole world, imagine what would happen to the Shin Beth's secrets in the court." Podhazur, *Herzog: The Shin Beth Must Be Allowed to Function; This Year It Uncovered 310 Terrorist Rings*, Haaretz (weekly ed.), Jan. 23, 1987, at A1, col. 1.

In May 1988, President Herzog was elected by the Knesset to a second five-year term of office. See Haaretz (weekly ed.), May 12, 1988, at A7, col. 7 (photograph with caption).

B. The "New Shin Beth Affair": The Case of Izat Nafsu

In April 1987, cryptic reports of a "new security scandal" began to circulate. In the first news stories, it was reported that publication of names and other details had been forbidden by the Supreme Court. All that was reported was that "a public figure" was suspected of fabricating evidence and obstructing justice.²¹²

The details were gradually made public. The case involved an Israeli Arab Army lieutenant, Izat Nafsu, who had been convicted in 1980 of espionage and sentenced to 18 years in prison. Nafsu claimed that he had been framed during the trial by fabricated evidence, but he lost his appeal in the higher military court. In the summer of 1986, the Military Justice Law was amended to permit people who lost appeals in the military courts to take their cases to the civilian Supreme Court, which Nafsu did. Nafsu claimed that Yosef Ginossar, one of the Shin Beth legal advisers pardoned by President Herzog in the original Shin Beth Affair,²¹³ was also involved in fabricating evidence in his trial.²¹⁴ The question then arose whether there should be an investigation of the Shin Beth's procedures or whether the matter should simply be limited to the Nafsu case. Attorney General Harish opposed an investigation.²¹⁵

In late May 1987, the Israeli Supreme Court issued its decision in the case.²¹⁶ Chief Justice Shamgar, writing for the Court, recounted Nafsu's claim that he had been convicted in the military courts on the basis of a confession that was inadmissible due to impermissible physical force exerted on him by Shin Beth agents. According to Nafsu, the force included pulling of the hair, being knocked to the ground, kicked, slapped, and verbally abused. He was forced to remove his clothes and stand in a cold shower. He was not allowed to sleep for extended periods and was forced to stand for long periods in the prison courtyard even when not being interrogated. In addition, his

212. *Elon, New Security Affair: Public Figure Suspected of Fabricating Evidence*, Haaretz (weekly ed.), Apr. 13, 1987, at A1, col. 1.

213. Only the name of Avraham Shalom, the head of the Shin Beth, was made public at the time of the Shin Beth decision in 1986; the other recipients of the pardons remained anonymous. Mr. Ginossar's name was first made public when his picture was published in the Israeli press in January 1987. See Haaretz, Jan. 14, 1987, at 1, col. 7.

214. Friedman, *Israel Facing A New Security Scandal*, N.Y. Times, Apr. 16, 1987, at A3, col. 1; *Elon, The Prisoner Accuses Ginossar* . . . , Haaretz (weekly ed.), Apr. 16, 1987, at A1, col. 5; *Elon, The New Security Affair* . . . , *id.* at A5, col. 1.

215. *Elon, Jurists: Shin Beth Agents Lied at Nafsu's Trial*, Haaretz (weekly ed.), Apr. 24, 1987, at A1, col. 6.

216. *Nafsu v. Military Advocate General*, 41(II) P.D. 631 (1987).

interrogators threatened that his mother and wife would be arrested.²¹⁷

The Court recounted the fact that when the hearing in the Supreme Court began, the Government attorney announced that an investigation had been conducted by the Shin Beth as well as by the Government attorney himself, and new facts were discovered that confirmed most of Nafsu's claims.²¹⁸ In light of that fact, the prosecution reached an agreement with Nafsu whereby the charges of treason and spying would be dropped. Nafsu would admit to the crime of derogation from authority to the extent of endangering the security of the State.²¹⁹ The facts stipulated to in the agreement reveal that Nafsu did exceed his authority and violate the law by meeting with Palestinian guerilla leaders in Southern Lebanon in 1979, although his intention was to get information helpful to Israel. When the leader from Al Fatah, an organization within the Palestine Liberation Organization, requested information on Israeli Army operations, Nafsu broke off contact.²²⁰ Nafsu then failed to report these meetings to his superiors.²²¹

After hearing testimony in the case, the Court accepted the version of the facts presented in the agreement outlined above. As a result, the Court invalidated the previous convictions arrived at in the military courts and instead convicted Nafsu, on the basis of his confession, of derogation from authority in meeting with the Palestinian guerrillas.²²² For this he was demoted to sergeant major and sentenced to two years in prison. Since he had already been in prison for seven and a half years, the Court ordered him released.²²³

217. *Id.* at 633.

218. *Id.*

219. *Id.* at 634.

220. *Id.* at 634-35.

221. *Id.* at 635.

222. *Id.* at 636.

223. *Id.* at 637-38 (reviewing various factors as forming basis of sentence). See Friedman, *Court Finds Israel Framed a Moslem*, N.Y. Times, May 26, 1987, at A1, col. 1; Elon, *Nafsu Released; Judges Harshly Criticize the Shin Beth*, Haaretz (weekly ed.), May 28, 1987, at A5, col. 1. The Court's decision was praised in the press. See *Medal of Honor for the Legal System* (editorial), Haaretz (weekly ed.), May 28, 1987, at A7, col. 1; *Israel Judges Itself* (editorial), N.Y. Times, May 30, 1987, at 30, col. 1.

The Court urged that the military authorities consider providing Nafsu with compensation since he had served more time in prison than the two years to which the Court had now sentenced him. *Nafsu*, 41(II) P.D. at 638. Three months after the Supreme Court's decision, it was reported that Nafsu would receive 70,000 shekels (about \$47,000) from the Army as compensation. The sum represented the salary he would have received during the five years and four months he served in prison beyond the two years of the sentence that the Supreme Court

In overturning the treason conviction, the Court severely criticized the Shin Beth, both for the methods of interrogation its agents had employed and for lying to the military tribunals in an effort to cover up these actions. The Court called for decisive steps to be taken "in order to root out phenomena such as this," and implored the Attorney General to look into the matter.²²⁴

C. The Landau Commission

In the wake of the Nafsu affair, Prime Minister Shamir requested the establishment of a commission of inquiry to examine the conduct of the Shin Beth, including its methods of interrogation. The Cabinet voted on May 31, 1987 to establish the commission.²²⁵ Former Supreme Court Chief Justice Moshe Landau was appointed its chairman.²²⁶ The commission was only empowered to act as a fact-finding body with regard to the Shin Beth's practices and to frame suggestions for reform.²²⁷

The Landau Commission issued its report in late October 1987, although only part of the report was made public.²²⁸ A full review of its findings is beyond the scope of this article. The following is a brief summary of the commission's findings, as reported in the Israeli and American press.

The Landau Commission found that over the past 16 years, since 1971, Shin Beth agents had routinely exercised excessive physical and psychological "pressure" on suspects in order to obtain confessions, and then lied in the military courts to cover up their actions. The report found:

In other words, [the Shin Beth agents] simply lied, and thus committed the crime of perjury. . . . The giving of false testimony in

affirmed. Podhazur, *Nafsu Will Receive About 70,000 Shekels Compensation for the Period of Imprisonment*, Haaretz (weekly ed.), Aug. 28, 1987, at A6, col. 8.

224. *Nafsu*, 41(II) P.D. at 636.

225. *Shamir Asks Inquiry in Security Case*, N.Y. Times, June 2, 1987, at A2, col. 1.

226. The other two members of the Commission were State Comptroller Yaakov Meltz, and Yitzhak Hofi, former head of the Mossad intelligence service and now a general in the Army Reserves. Elon, *Landau Commission Will Convene Soon*, Haaretz (weekly ed.), June 5, 1987, at A1, col. 5.

227. Professor Amnon Rubinstein criticized "[t]he establishment of a commission of inquiry whose whole purpose is nothing more than making suggestions in an area that is the duty of the Government," calling it "an Israeli invention." Rubinstein, *The "Judicialization" of Israel*, Haaretz (weekly ed.), June 5, 1987, at B1, col. 1.

228. The newspaper Haaretz referred to "the public portion of the report." *Three Leaders of the Shin Beth Are Responsible for 16 Years of Perjury*, Haaretz (weekly ed.), Nov. 6, 1987, at A4, col. 1.

the Courts quickly became a norm that no one questioned. This norm was to remain in practice for 16 years. . . . Two serious events that were publicized and caused an upheaval, one after the other, the Bus 300 affair [i.e., the original Shin Beth Affair] and the Nafsu affair, are what quickly led to the discovery of this norm as well as its cessation.²²⁹

Despite its findings, the commission recommended that no legal action be taken against any of the Shin Beth agents suspected of exerting "pressure" on suspects during the investigations and of committing perjury during trials. This recommendation was based on the finding that the agents had not deviated from the directives in effect at the time of the interrogations. As for giving false testimony, the commission recommended that the agents not be prosecuted because their motivation had not been selfish, but rather they mistakenly believed that their actions served the public. The commission expressed concern that had it recommended legal action against the Shin Beth agents, the service would be paralyzed and the public would suffer.²³⁰

Significantly, the commission explicitly condoned the use of some force in the course of interrogation. *The New York Times* reported:

The report did not condemn the use of psychological pressures and even moderate use of force against guerrillas, saying those who try to kill and maim women and children have forfeited the "moral right to demand the state safeguard normally accepted civil rights." When psychological methods fail, "mild physical pressure should not be avoided," but Shin Beth should be humane and draw clear guidelines to prevent excessive use of force, it said.²³¹

The report has not gone unheeded. In early November 1987, the Government voted to accept the Landau Commission's findings and to appoint a committee of Government ministers to oversee the Shin Beth.²³² Whether such oversight will be effective remains to be seen.

229. *Id.*

230. *Id.* See also *Israel Inquiry Says Security Agents Lied at Trials of Terrorist Suspects*, N.Y. Times, Oct. 31, 1987, at 1, col. 4.

231. *Id.*

232. The committee was to consist of Prime Minister Shamir as Chairman, as well as Foreign Minister Shimon Peres, Defense Minister Yitzhak Rabin, and the Justice Minister. Eldar, *Ministerial Committee Led by Shamir Will Supervise Implementation of Landau Report's Recommendations*, Haaretz (weekly ed.), Nov. 13, 1987, at A5, col. 5.

VII. RECOMMENDATIONS FOR REFORM

Criticizing the Supreme Court's reasoning in upholding the President's pardons may shed light on the issue, but it is not sufficient. It is now settled law: the President may pardon prior to conviction. Both Chief Justice Shamgar and Vice-Chief Justice Ben-Porat suggested that reform might be due, but said that any change in what they saw as the existing legal situation should be accomplished by legislation.²³³ Chief Justice Shamgar specifically recommended that the pardoning process be depoliticized.²³⁴ Although the requirement of the countersignature was intended to prevent the arbitrary use of the pardoning power, this device, as we have seen, is not effective in its present form.²³⁵ A new arrangement is required.

The pardoning power could be eliminated totally, but such a step does not seem desirable. The institution, though a remnant of absolute monarchy, has been retained by most of the countries of the world.²³⁶ While the possibility of injustice through error is today largely addressed in Israel by the provision for retrial,²³⁷ no system is immune to failure. Thus, the traditional reason for the power remains.

It has been suggested in the American context that the pardoning power could be concentrated in another authority—for example, the legislature or judiciary—but this same analysis rejected such a change for the reason that the pardon is needed precisely to provide a check on the legislature and judiciary. If the legislature passes laws that are too harsh, the pardon can be used to suggest reform; if the judiciary errs, the pardon can be used to avoid injustice.²³⁸

This same analysis concluded with the suggestion that in the United States the pardoning power be left to the President, but that Congress be provided with a veto power. The President's pardon would be effective unless and until Congress voted within 180 days by a two-thirds majority to disapprove the pardon.²³⁹ But such an ar-

233. *Shin Beth Case*, 40(III) P.D. at 534 (Shamgar, C.J.); *id.* at 583 (Ben-Porat, V.C.J., concurring).

234. *Id.* at 563.

235. *See supra* notes 181-88 and accompanying text.

236. *See* Sebba, *The Pardoning Power—A World Survey*, 68 J. CRIM. L. & CRIMINOLOGY 83 (1977).

237. *Courts Law*, 11 L.S.I. at 159, § 9 (1957).

238. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 536-37 (1977).

239. *Id.* at 537. The arrangement is that of an amendment proposed by Senator Mondale in the 93d Congress. S.J. Res. 240, 93d Cong., 2d Sess. (1974).

rangement, though perhaps workable in the United States, would be untenable in Israel. Given the Israeli President's honorary position and the great esteem in which the office has traditionally been held, the Knesset would surely be reluctant to disapprove of the President's action by an open vote. The President is, after all, supposed to be above politics.

The recommendation of the noted scholar S.Z. Feller²⁴⁰ deserves serious consideration. He accepts the need for the institution of pardon but advocates a change in the way it may be exercised. In his view, pardon should operate on the punishment only, and as such be seen as an act of mercy. It could thus be used only after conviction. It would not serve to erase guilt, for this would undermine the deterrent effect of a final judicial determination, as well as judicial authority.²⁴¹ In the case where there is error in the conviction, the institution of retrial can be employed.²⁴² Thus may an unjust conviction be obliterated. Acquittal is a declaration that there is no guilt; there should not be resort to the legal fiction of using a pardon to acknowledge that a crime has been committed and at the same time to say that it has not been committed.²⁴³ In the case of the Shin Beth Affair, as we have seen, the pardoned legal advisers attempted to retain their positions, claiming that their guilt had been erased, but their acts had not disappeared from memory.²⁴⁴

Professor Feller recommended the following change in the Basic Law, a change that seems especially wise in the wake of the Shin Beth Affair. Section 11(b) would be amended as follows:

(b) The President of the State shall have the power to remit punishments. The remission may be full or partial, or may commute the sentence to one less severe.

(c) The remission shall be individual, and even if it is full it shall not serve to erase the conviction.²⁴⁵

240. Feller, *Rehabilitation—A Special Legal Institution Required by Reality*, 1 MISHPATIM 497 (Hebrew, 1969).

241. *Id.* at 503.

242. *Id.* Retrial is provided for in the Courts Law, 11 L.S.I. at 159, § 9.

243. *See* Feller, *supra* note 240, at 506.

244. *See supra* text accompanying notes 202-04.

245. Feller, *supra* note 240, at 518 (proposed amendment No. 3). Professor Feller used the word *limhol* (root *m-h-l*), which is variously translated as to pardon, forgive, forgo, renounce, yield, remit. Given the legal meaning of the English term "pardon," however, it is clear that "pardon" would not be an appropriate translation. Feller studiously avoided the Hebrew word *lahon*, which currently appears in Basic Law: President and which means "to pardon," laden as it is with a sense of absolute authority. *See supra* note 122.

Adoption of Professor Feller's proposal, or some version thereof, would be a wise step for a number of reasons. It would avoid the separation of powers problem inherent in the use of the pre-conviction pardon. The police investigate and the courts judge, and it is not desirable that the President of Israel, who does not possess any machinery to perform his own investigation, be permitted to interfere with the functioning of the criminal justice system. The proposal would also depoliticize the pardon, since by its being restricted to the post-conviction stage, it could not be used to shield individuals from the law in the supposed interest of national security. Any injustice that occurs in a trial may be addressed by a retrial. The President's power would be restricted to an act of mercy in the most extraordinary circumstances, but he would not be able to erase guilt. This is appropriate for a functionary who is not, as the King of England was traditionally viewed, the "fountain of justice."²⁴⁶

VIII. CONCLUSION

The Israeli President's pardoning power in its present form is too easily given to abuse, as the Shin Beth Affair clearly demonstrates. This was not the first time that a controversial pardon has been granted,²⁴⁷ though it may well have been the most controversial. The President of Israel is said to symbolize the State and be above politics. The pardoning power in its present form seriously threatens to undermine this status. By descending to the battlefield of the Shin Beth controversy, the President politicized the office and damaged its integrity.

The Shin Beth Case was, in the end, a confrontation between the asserted requirements of national security on the one hand and the rule of law on the other. In this case, the President, in the name of national security, subverted the rule of law. He said to the nation that agents of the security forces are above the law. The Supreme Court in turn, by upholding the President's pardons, said to the nation that the President is above the law.

Attorney General Harish, in arguing before the Court that the President should not be called to answer the claims against his actions, stated: "The President must remain a symbol, saved from hatred and evil attacks. . . . A king does not judge, and he is not judged.

246. S.A. DE SMITH, *supra* note 153, at 128.

247. See Bracha, *supra* note 128, at 223-24 n.144-45 (citing examples of other controversial uses of the Presidential pardon).

We have no king. We have only a President. He . . . symbolizes the State."²⁴⁸

It was thus perhaps in response to Attorney General Harish's statement that Justice Barak chose to conclude his dissent as he did:

It is told that there once was an argument between King James I and Lord Coke. The question was whether the King was authorized to take matters belonging to the judiciary into his hands and decide them on his own. Lord Coke tried to convince the King that judgment required expertise that the King did not possess. The King was not convinced. Thereupon, Lord Coke rose and said:

"Quod rex non debet sub homine, sed sub deo et lege."

"The King ought not to be subject to man, but subject to God and to the law."

So be it.²⁴⁹

248. Shargai, *Shin Beth Head: All My Actions Were Authorized*, Haaretz, July 1, 1986, at 1, col. 4.

249. Shin Beth Case, 40(III) P.D. at 623 (Barak, J., dissenting).